Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

GARY G. SHARPE, *et al.*,

Petitioners,

v.

BRUCE CURETON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether in the face of an extended history of retribution against employees for exercise of political rights, federal courts are powerless to prohibit the guilty public official from continuing the pattern of violations.

II. Whether vague, ambiguous Rule 68 offers defeat the congressional intent of using 42 U.S.C. § 1988 to encourage private citizens to join in the effort to preserve fundamental rights.

III. Whether the continuing violations doctrine applies where a pattern or practice of unconstitutional conduct has been established.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners are Gary G. Sharpe, William G. Potter, Kenneth F. Scarbrough, Frank E. Potter, and William H. McGinnis, five firefighters who at relevant times, were employed by the City of Knoxville.

Respondents are Bruce Cureton, the former Fire Chief of the City of Knoxville, in his individual and official capacities, Victor Ashe, Mayor of the City of Knoxville, in his individual and official capacities, and the City of Knoxville.

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 319 F.3d 259 (6th Cir. 2003). The original opinion is contained in the Appendix ("App.") at page 1a. The Memorandum Opinions and Orders of the United States District Court for the Eastern District of Tennessee, at Knoxville, from which both parties appealed, are unreported and are included in the Appendix at 38a and 78a.

STATEMENT OF THE BASIS FOR JURISDICTION

Federal Subject Matter Jurisdiction in this action is predicated upon 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Appellate jurisdiction arose under Fed. R. Civ. P. 54 and proceeds under Rule 10 of the United States Supreme Court Rules. The opinion of the United States Court of Appeals for the Sixth Circuit was filed on February 13, 2003. Petitioners filed a Petition for Rehearing *En Banc*, which was denied on April 10, 2003 (App. at 117a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved in this action are 42 U.S.C. §§ 1983, 1988, and the First and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

On the eve of the 1995 mayoral election in Knoxville, Tennessee, the incumbent Mayor began his campaign of retaliation. He abruptly transferred a number of prominent civil service protected firefighters who had supported his opponent, or who had remained neutral in the election (including a Deputy Chief who was transferred to a supply closet, two Assistant Chiefs and a Fire Officer). App. at 4a-5a. In the face of grievances filed to protest his clearly illegal acts, the retaliation continued. When merit pay awards for 1995 were announced a few weeks later, **all** the firefighters who supported the Mayor's opponent were denied merit pay (App. at 6a), and not a single supporter of his opponent received a promotion that year. After the filing of the federal lawsuit, each of the Petitioners was retaliated against for asserting his rights in court in that Respondents refused to even consider them for 1996 merit pay increases because the Petitioners had filed this lawsuit. App. at 94a.

In addition to this pattern of retaliatory acts against the named Plaintiffs, the proof established that the Mayor had a broader, longstanding policy of political retaliation which began in 1988 (his first term in office). One witness explained the Mayor's hiring and promotion policy graphically. He personally watched as the Mayor struck names of firefighters' sons from hiring lists explaining that he did not feel the fathers had done enough for him in his campaign. App. at 8a. He observed the Mayor "skipping around" the candidates on the promotional list and rejecting those who had not supported him. App. at 86a-87a. That witness later became a victim of the Mayor's illegal policy when he chose to support someone other than the Mayor in his second campaign. He was demoted two ranks, his pay was

substantially cut, and he was denied tuition reimbursement. App. at 87a. Others also testified as to their experience with the political demands of the Mayor and the consequences for those who refused to "fall in line." The jury found the 1995 transfers were politically motivated. The jury also found the 1995 transfers were a part of a pattern and/or over-arching scheme of political (systemic) discrimination (App. at 87a), so that the transfer claims (otherwise asserted a few days outside the one year limitations period) were not time barred.

The jury awarded a total of $30,645.00 in compensatory damages, which the Trial Court reduced by approximately half when it held as a matter of law that the 1995 transfer claims were untimely and refused to apply the continuing violations doctrine. App. at 3a. The jury's verdict was not appealed. Their findings of retaliation and over-arching scheme stand unchallenged.

Following the trial, the Respondents filed a motion for costs claiming the Rule 68 offers they had tendered exceeded the relief granted. App. at 10a. The Trial Court initially granted Respondents' motion, then later reversed itself on motion to alter or amend. *Id.* The Petitioners argued that the offers were insufficiently definite to constitute valid offers. App. at 97a. *See also* Respondents' offers, App. at 98a-107a. The Trial Court agreed with Petitioners, noting that their counsel had telephoned Respondents' counsel asking that the offers be clarified and also wrote to them for clarification of their offer of an "agreement" (versus an injunction), not to discriminate, and W. Potter's "base rate," but Petitioners were stonewalled. App. at 108a and 110a. The Respondents at no time denied the telephone call or that they received the requests for clarification. The Trial Court also found that the Respondents had waited until after trial to calculate

the monetary value of the offers rather than doing so when the offers were made. App. at 109a. Based upon the foregoing, and the numerous ambiguities in the offers (App. at 107a-112a), the Trial Court held the offers were invalid (App. at 113a) and awarded Petitioners $230,538.87 of the $357,775.20 originally requested. App. at 67a. Both parties appealed that Order.

Throughout this litigation, however, the Mayor vigorously defended his right to take such retaliatory actions, and demanded qualified immunity both in the Trial Court, on pre-trial appeal (App. at 92a), and by Petition for Certiorari to this Court. App. at 7a. The Sixth Circuit rightly rejected the claim for qualified immunity, holding that "defendants have never given a satisfactory answer to the question of how a reasonable official could read the Supreme Court's opinion in *Rutan* . . . and still consider it constitutional to punish the plaintiffs in the manner the plaintiffs claim to have been punished for exercising their free speech rights." App. at 93a. The Mayor continued to vigorously assert his triviality defense characterizing the political retaliation as "relatively minor" and of no "constitutional significance." Even after the jury found ten separate civil rights violations by the Respondents, the Mayor called a press conference and his representatives continued to insist that the Mayor's actions were "insignificant" and claimed the jury's verdict was a "pure victory" for Respondents. The post-trial interview made the Mayor's state of mind clear: his "victory" was that, having escaped punitive damages, there would be no damages he would have to personally pay for his wrongdoing. He showed no concern about being found guilty of multiple violations of the constitutional rights of the firefighters. The Respondents' unaltered conduct and attitude during and after the trial demonstrated the critical need for an

injunction if political rights in Knoxville were to be honored. The Trial Court entered the following injunction:

> Mayor Ashe is hereby enjoined from taking any adverse employment actions such as transfers, demotions, refusal to hire, refusal to promote, reduction of compensation or refusal to increase compensation of Knoxville Fire Department firefighters on account of their political beliefs and associations or their choice to remain neutral in political matters. This injunction shall not apply, however, to any Knoxville Fire Department employees who are not covered by the city's civil service regulations.

App. at 115a-116a.

Thereafter, in wholly separate proceedings, the Hearing Officer appointed by the City in its grievance process, found another (non-Plaintiff) Knoxville firefighter had been retaliated against because of his support of the Mayor's opponent in the 1999 campaign and that the retaliation had occurred after the injunction was entered, before the Sixth Circuit vacated it. App. at 125a-131a. Though appealed by the City, the finding that Robert Crisp was retaliated against because of his non-support of the Mayor, was affirmed by the local Chancery Court. App. at 120a.

On appeal of this matter, the Sixth Circuit vacated the injunction because it gave relief to a class without a class action being filed. Without overturning any fact findings of the Trial Court, the Sixth Circuit (arguably *dicta*) said there was no likelihood the Mayor's actions would be repeated. In reality, there was simply no evidence to counter-balance

the Respondents' history of political vindictiveness and unwillingness to accept the Sixth Circuit's, the jury's, or the Trial Court's declaration that their actions were unconstitutional. The proof established that the Mayor's disregard for constitutional rights spanned three decades, impacted more than these Petitioners, and his post-trial behavior demonstrated that he continued to trivialize his employees' political rights. His vindictiveness was not even deterred while the lawsuit was pending, or even after the injunction was entered by the Trial Court.

The Sixth Circuit then also reversed the Trial Court's holding that the Rule 68 offers were too vague and uncertain to be enforceable (thereby reversing the award of attorneys' fees), and held that the continuing violations doctrine could not apply because the 1995 transfers were "discrete acts." Petitioners timely appealed.

REASONS FOR GRANTING THE PETITION

I. Whether In The Face Of An Extended History Of Retribution Against Employees For Exercise Of Political Rights, Federal Courts Are Powerless To Prohibit The Guilty Public Official From Continuing The Pattern Of Violations.

The Sixth Circuit has decided this important question of federal law in derogation of relevant decisions of this Court and other circuits. Grounded in the practice of the high chancery courts of England, federal courts in equity have exercised the power and discretion to halt illegal conduct "from time immemorial." *Russel v. Farley*, 105 U.S. 433, 438 (1881). While this Court has taught both the critical importance of political freedom and the inherent responsibility of federal courts to guard

that freedom by restricting the unconstitutional conduct of offending officials, the Sixth Circuit believes the District Court to be without the responsibility or the power to issue the injunction that commanded the offending Mayor to cease his political retaliation against Knoxville's Civil Service firefighters.

In so doing, the Sixth Circuit took a position contrary to this Court's pronouncements that political freedom is not just a constitutional right, but a fundamental right. *See Elrod v. Burns*, 427 U.S. 347 (1976). Such rights require special vigilance because they are not only "deeply rooted in this Nation's history and tradition," but also because they are "implicit in the concept of ordered liberty." *Chavez v. Martinez*, __ U.S. __, 123 S. Ct. 1994, 2005 (2003), *quoting Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). When political freedom is infringed upon, the damage is two-fold: (1) the individual suffers personal loss of the exercise of that freedom in retaliation for exercise of it; and (2) the concept of ordered liberty is imperiled because the political process is corrupted or perverted by the threat that retaliation poses. *Elrod* at 357. To the extent that fear of retaliation causes citizens to shrink from the electoral process or feign support for a candidate, the threat of retaliation acts as the functional equivalent of a prior restraint on the exercise of First Amendment rights. Former Justice White, writing for this Court, wisely mandated that a governmental "work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine." *United States Civil Service Commission v. Nat'l Association of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973). Further, he emphasized the importance of raising substantial barriers against those in power using government employees, paid for at public expense, to operate such a political structure. *Id.*

Recognizing the enormous implications of infringements on individual political freedom, this Court has consistently held that the loss of such rights, even for minimal periods of time, constitutes irreparable harm. *See Elrod* at 373-74. The greater damage (the harm to our ordered form of government) comes from the restraint that fear imposes on the exercise of political conscience and association. Where retaliation is a viable threat, the ballot box control that defines a representative government is perverted, if not destroyed. If the federal courts cannot act effectively to prohibit such political abuse, confidence in the representative form of government is likely to be eroded to a "disastrous extent." *Cf. United States Civil Service Commission v. Nat'l Assoc. of Letter Carriers AFL-CIO*, 413 U.S. 548, 564 (1973).

After the jury found multiple and repeated unconstitutional retaliations, the Trial Court restrained the offending Mayor from continuing his pattern of conduct, whether against the five firefighters named as Plaintiffs, or against any other civil service protected member of the Knoxville Fire Department. After hearing days of proof and closely watching the witnesses, the Trial Court believed it needed to emphasize "in a most clear and effective way that the freedoms of political belief and political association are hard-won and precious freedoms which are not to be trifled with and that the federal courts [will] effectively deal with those who attempt to do so." App. at 94a. The Sixth Circuit ruled the District Court had no power to address the clearly illegal conduct of the offending Mayor as to any victims except the named Plaintiffs, absent a class action.

Requiring a class action, of course, wholly fails to recognize the reality of the systemic injury: those whose speech have been inhibited by fear of retaliation cannot be identified for they are the ones too silenced by fear of losing livelihoods or job conditions

to exercise those fundamental rights. Moreover, under Fed. R. Civ. P. 23, there could never be a class representative for such a class of those afraid to speak. As soon as potential plaintiffs speak by identifying themselves, they not only risk retaliation, but are, by definition, no longer qualified to be a representative of the silenced class. The Sixth Circuit's analysis leaves the offending public official, whom the jury found guilty of a pattern and practice of retaliation, free to continue his reign of retaliation against all but the named Plaintiffs. That result only widens the circle of the intimidation by demonstrating to all citizens, who live in the offending official's shadow the near futility of undertaking to preserve constitutional rights and the courts' inability to deal effectively with proven, repeated violators.

In *Virginian Ry Co. v. System Federal No. 40*, 300 U.S. 515, 601 (1937), this Court explained that when the public interest is involved, "[c]ourts of equity may, and frequently do, go much further . . . than they are accustomed to go when only private interests are involved." The Sixth Circuit, however, has apparently taken the position that the dispute involved herein is a matter of private interest only, contrary to a long line of this Court's decisions recognizing the systemic importance of political freedom and contrary to the reality of what is necessary for this important, fundamental right to be adequately protected. The conduct of the offending Mayor herein was not directed only at the named Plaintiffs. His wrong-doing reached far beyond their private interests. Any effective remedy must reach not only the private interest, but also the over-riding public interests. As Petitioner, W. Potter, 44 year veteran of the Fire Department and Deputy Chief testified: "I feel like I don't deserve [the] treatment that I received. I am in my midnight hour at my career at the Fire Department. I don't want to leave it

where anyone else will have to suffer this humiliation. . . ." (Tr. at 201.)

The approach of the Sixth Circuit to this important issue directly conflicts with the recognized approach of other circuits which would focus on eradicating the illegal conduct rather than focusing on limiting relief to those courageous enough to exercise political freedom in the face of predictable reprisal. *See, e.g., Seibert v. Sperry Rand Corp.*, 586 F.2d 949, 951 (2d Cir. 1978) ("suit for injunction seeks not only to eliminate the effect of past wrongdoing, but . . . to prevent its recurrence"); *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963) (the nature of the § 1983 rights to be vindicated requires a decree to run to the benefit not only of a plaintiff, but others similarly situated); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969) (granting plant-wide injunction without a class action to effectively terminate the illegal practice); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1988) ("[c]lass-wide relief may be appropriate even in an individual action." *Citing, Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1136 (11th Cir. 1984)).

Few things can be more important than maintaining the integrity of the very system by which we elect our leaders who enact the statutes that control the conduct of our people, courts, and officials. The Sixth Circuit's unduly narrow view of the power of the District Court and its failure to recognize both the fundamental importance of political freedom and the impossibility of identifying those who have been intimidated from the exercise of such freedom, has been severely undercut by this Court's mandates in *Elrod* and its progeny, and has created a deep division in the circuits on this important issue.

II. Whether Vague, Ambiguous Rule 68 Offers Defeat The Congressional Intent Of Using 42 U.S.C. § 1988 To Encourage Private Citizens To Join In The Effort To Preserve Fundamental Rights.

This Court has long recognized that the most important, fundamental freedoms, though priceless, cannot easily be translated into the monetary remedies so familiar to the courts. In this case, for example, the jury found ten separate counts of constitutional violations of fundamental rights by Respondents, but initially awarded only a de minimus compensatory damage award and "hung" on punitive damages. After further deliberations, modest compensatory damages were awarded.

The lesson is that unless substantial monetary damages are incurred, public employees' fundamental rights are pursued only at great financial risk. Victims of political retaliation must either accept their fate or risk their life savings to vindicate those lost rights, if they can find counsel willing to oppose the powers that be.

Congress, recognizing the importance of guarding fundamental rights, and the difficulty in doing so in courts where injury traditionally is measured only in money, provided for recovery of attorneys' fees in 42 U.S.C. § 1988, seeking to encourage citizens to act as private attorney generals in the vigilant protection of the public interest and their own constitutional rights:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in

> part upon private litigation as a means of securing broad compliance with the law. . . . When a plaintiff . . . obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. . . . If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees. . . .

Newman v. Piggie Park Ent., Inc., 390 U.S. 400, 401 (1968).

The coercive effect of Rule 68 is magnified in § 1983 cases where Rule 68's reference to "costs" is read to include § 1988 attorneys' fees. While the fee shifting statute may make the risk associated with civil rights cases more palatable for those convinced that their case is meritorious, Rule 68 "ups the ante" by threatening to extinguish the fee shift if the plaintiffs' prediction of what a jury might do is less than perfect. The result is that the fee awards Congress intended to use to entice attorneys to assist private attorney generals is perverted into a high stakes bet on whether juries will place a high enough monetary value on priceless rights not amenable to monetary measure.

Fundamental fairness requires that equitable principles be applied to strike a balance between the rights and obligations of the parties. When the stakes are so high for civil rights plaintiffs, defendants should, at a minimum, bear the burden of articulating a clear, unambiguous offer. Valid monetary offers should not require calculations or assumptions by plaintiffs.

Non-monetary offers should be required to meet the specificity/ clarity standards required for injunctions. Admissions or non-admissions of guilt should be clearly set forth, and offers of reasonable attorneys' fees and costs should be explicitly stated. At an absolute minimum, the offers should meet the standard for valid contract offers and a respondent's unreasonable refusal to clarify ambiguous terms should invalidate the offer.

There is confusion in the circuits as to the degree of specificity required for a valid Rule 68 offer, and the lengths to which courts should go to "fill in the blanks" in ambiguous offers. The degree of specificity variance has expressed itself most often in the context of ambiguity as to whether attorneys' fees are included in the offer. Some circuits require explicit mention of attorneys' fees to deem them to be within the terms of the offers. *See, e.g., Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830, 833 (9th Cir. 1997). ("defendants are the master of what their Rule 68 offers offer. If there is any room for doubt about what is included, or excluded, when 'costs' are offered, the defendant can craft its offer to make clear the total dollar amount that it will pay.")

Other courts find attorneys' fees sufficiently within the offer if the Rule 68 offer merely references "costs" or "judgment." *See, e.g., Le v. Univ. of Pennsylvania*, 321 F.3d 403, 409 (3d Cir. 2003) (language in an offer of $50,000 "plus costs" included attorneys' fees); *First Financial Ins. Co. v. Hammons*, 58 Fed. Appx. 31, 2003 WL 264700, at *3 (4th Cir. 2003) ("where 'attorneys' fees are actually a part of the substantive relief sought in [the] judgment, then using the word 'judgment' alone in an offer to settle the matter creates no ambiguity.'")

As to monetary judgments, some circuits require "easily comparable sums," or two precise numbers to compare, for the Rule 68 offer to be valid, while others place the burden on plaintiffs to perform calculations to evaluate the offer. *Compare Arkla Energy Resources v. Roye Realty and Developing, Inc.*, 9 F.3d 855, 867 (10th Cir. 1993), *with* the Sixth Circuits' decision herein.

More troublesome still is the variant approach in the circuits involving non-monetary relief. A Rule 68 offer places the offeree "at the mercy of the [defendants'] choice of language and willingness to conform it to the understanding of both parties." *Utility Automation 2000, Inc. v. Choctawhatchee Elec. Cooperative, Inc.*, 298 F.3d 1238, 1244 (11th Cir. 2002). For example, in the instant case, Respondents offered "an agreement. . . . not to engage in any discriminatory practices in the future based on political affiliation." App. at 110a. Despite that offer, Respondents had maintained throughout the litigation that the subject acts (transfers, denial of merit pay, failure to promote, demotion, and refusal to consider for merit pay), even if based on political animus, were not the kinds of acts that constitute political discrimination, per *Elrod*. It was, therefore, patently unclear whether the Rule 68 offer meant that Respondents would cease the complained of activity. Because agreements in consent decrees are generally viewed as contracts, and are therefore construed in favor of the person charged with contempt (*AccuSoft Corp. v. Palo*, 237 F.3d 31, 47 (1st Cir. 2001)), the non-monetary relief offered was ambiguous at best and likely ineffective. To make matters worse, when Petitioners requested clarification on those precise issues, Respondents simply stonewalled. Some circuits hold that a refusal to make a requested clarification invalidates the Rule 68 offers, others do not. *Compare, e.g., Arkla*, 9 F.3d at 867 *with* this case.

The Sixth Circuit effectively eviscerated 42 U.S.C. § 1988 by refusing to require a reasonably certain monetary offer or a clear non-monetary commitment, when clarification was requested. This Court's leadership is needed to insure that the circuits do not allow the law of Rule 68 to swallow 42 U.S.C. § 1983, 42 U.S.C. § 1988 and the clear intent of Congress – that private citizens, such as these firefighters, be enlisted in the ongoing effort to secure our most basic civil rights for the public interest.

III. Whether The Continuing Violations Doctrine Applies Where A Pattern Or Practice Of Unconstitutional Conduct Has Been Established.

In *National R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002), this Court expressly reserved ruling on whether the continuing violation doctrine applies to pattern or practice cases brought by private litigants. *Id.*, at 2073 n.9. This important question of law needs to be answered in context of what limitations, if any, exist on the federal court's power to order the cessation of clearly unconstitutional conduct and the remedy for courageous individuals who have suffered retaliation for exercising political rights and for seeking to enforce those rights, not only for themselves, but for the public good.

In this case, the offending Mayor's unconstitutional retaliation created an atmosphere where the functional equivalent of a prior restraint on political freedom (fear of exercising political rights) existed as the result of the "edicts [and] acts [which were] fairly said to represent official policy." *Monell v. Dept. of Social Services*, 98 S. Ct. 2018, 2037-38 (1978). The jury found violations by the Mayor, Fire Chief,

and the City of Knoxville. Clearly, because this case involved a local government's custom that inflicted multiple constitutional injuries, spanning over three decades, this is a pattern or practice case. The jury found an over-arching scheme of political retaliation. The jury's verdict was not even challenged on appeal. It stands undisturbed.

The acts involved here were not "discrete" as in separate or disjunctive (BLACK'S LAW DICTIONARY, 466 (6th ed. 1990)). These acts were part of an over-arching pattern or practice of political retaliation that has plagued the City of Knoxville, Tennessee, since at least 1988, when the offending Mayor took office and began eliminating names from the Fire Department's hiring and promotion lists because the subject candidates and/or their relatives "did not do enough" for him in his campaign.

The individual Petitioners herein were subjected to repeated retaliation and the treatment of each individual Petitioner exposed only a part of the pattern of systemic discrimination against those who did not support the Mayor's political ambitions. In *Parham v. J.R.*, 442 U.S. 584, 611 (1979), this Court referred to discrete acts as those that "leav[e] no trail of circumstances." *Id.*, at 611-12. The trail of circumstances left by this offending Mayor's acts is a severely compromised political system that threatens the most fundamental rights of our representative democracy.

The danger in allowing the Sixth Circuit's decision to stand is substantial. Not only will the jurisprudence of the Sixth Circuit then tolerate continued assaults on fundamental constitutional rights, other circuits may read this Court's denial of Certiorari as an indication of this Courts' willingness to tolerate an ever-widening disrespect for political freedom.

CONCLUSION

If federal courts are powerless to provide an effective remedy for a long standing policy of retaliation for exercise of political conscience, and Rule 68 is applied unreasonably to defeat Congress' intent, our hard won freedoms will be secured only by the naïve hope that public officials will always act benevolently. History and common sense tell us that hope is futile. For this reason, Petitioners respectfully request that this Court grant Certiorari to resolve the important questions involved herein.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AND FILED FEBRUARY 13, 2003

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 00-5805/
6089/6361/6362

GARY G. SHARPE; WILLIAM G. POTTER; KENNETH F. SCARBROUGH; FRANK E. POTTER; WILLIAM H. MCGINNIS,

Plaintiffs-Appellants/
Cross-Appellees
(00-5805/6089),
Plaintiffs-Appellees/
Cross-Appellants
(00-6361/6362),

v.

BRUCE CURETON, Chief, in his individual and official capacities; VICTOR ASHE, Mayor, in his individual and official capacities; CITY OF KNOXVILLE,

Defendants-Appellees/
Cross-Appellants
(00-5805/6089),
Defendants-Appellants/
Cross-Appellees
(00-6361/6362),

Appendix A

ROBERT PRESSLEY, Deputy Fire Chief, in his individual and official capacities,

Defendant-Appellee
(00-5805),
Defendant (00-6089),
Defendant/Cross-Appellee
(00-6361/6362).

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 96-00916—Robert P. Murrian, Magistrate Judge

Argued: June 19, 2002

Decided and Filed: February 13, 2003

Before: NORRIS and BATCHELDER, Circuit Judges;
FORESTER, Chief District Judge.*

* * *

OPINION

FORESTER, Chief District Judge. Immediately after being re-elected as Mayor of Knoxville, Tennessee, in September, 1995, Victor Ashe ordered Bruce Cureton, Fire Chief of the City of Knoxville, to transfer five Knoxville Fire Department firefighters to undesirable locations,

* The Honorable Karl S. Forester, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

ostensibly in retaliation for the firefighters' support of Ashe's opponent in the election. When these firefighters, Gary Sharpe ("Sharpe"), William Potter ("W. Potter"), Kenneth Scarbrough ("Scarbrough"), Frank Potter ("F. Potter"), and William McGinnis ("McGinnis"), were denied merit and bonus pay for 1995 and 1996, they filed this action pursuant to 42 U.S.C. § 1983. Plaintiff W. Potter added a claim alleging that he was transferred by the City of Knoxville in an effort to circumvent overtime pay requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et. seq.*

The jury awarded the plaintiffs a total of $30,645 in damages, but this amount was reduced when the district court ruled as a matter of law that recovery for the plaintiffs' retaliatory transfers was barred by the statute of limitations because the continuing violation doctrine did not apply. The district court also made the following rulings: it held that Offers of Judgment made by the defendants pursuant to Fed. R. Civ. P. 68 were unenforceable because they were void for vagueness; it enjoined Ashe from retaliating not only against the plaintiffs, but against other Knoxville Fire Department employees; it denied W. Potter's FLSA claim; and it granted the plaintiffs only a portion of the attorney fees they requested. The plaintiffs appeal the district court's Judgment as a Matter of Law against their transfer claims, the reduction of their attorney fees, and the dismissal of the FLSA claim, and they request this Court to take notice of post-judgment facts. The defendants cross-appeal the grant of the injunction and the holding that the Rule 68 offers were invalid.

Appendix A

I. FACTUAL AND PROCEDURAL BACKGROUND

W. Potter became a member of the Knoxville Fire Department ("KFD") in 1956, and by September of 1995 had advanced to the position of Administrative Deputy Chief of Firefighting.

Scarbrough joined the KFD in 1967, and by September, 1995, served as a fire officer at a north Knoxville station located conveniently near his home.

F. Potter (a younger brother of W. Potter) joined the KFD in 1972, and by September, 1995, served as assistant chief for a district in east Knoxville.

McGinnis joined the KFD in 1960, and by September 1995 served as an assistant chief for a district in west Knoxville.

In a 1995 Knoxville mayoral race between incumbent Mayor Victor Ashe and challenger Ivan Harmon, W. Potter and the other plaintiffs openly supported Harmon, with the exception of plaintiff McGinnis who remained politically neutral. Ashe ultimately won the September 26, 1995, election, and shortly thereafter transferred all of the plaintiffs from their positions except for Sharpe.

On September 26, W. Potter received a letter delivered by Chief Cureton, informing him that he was being transferred from the administrative offices to the main fire hall, where he would no longer have access to a city car, and his new job would encompass evaluating fire and emergency

service responses, tasks for which he was unfamiliar and did not feel qualified to undertake. W. Potter was assigned an office at the new location that was formerly used primarily as a storage closet and remained in disrepair. W. Potter worked at this location until February 1996, when he was transferred to become a shift chief, a position at which his hours per week were increased from 40 to 56.

Scarbrough was also informed of his transfer on September 26 when he was told that he should report the next morning to an unfamiliar station in south Knoxville. Scarbrough testified that the transfer damaged his performance because it is important for firefighters to be familiar with the territory they protect.

F. Potter learned on September 25 that he would be transferred to a station in north Knoxville effective September 26. F. Potter and Ashe had been friends, but the evidence indicated that F. Potter had deceived Ashe by voicing his political support, but appearing at a Harmon fundraiser. F. Potter spent four months at the north Knoxville location before being transferred to west Knoxville. He testified that the transfers to unfamiliar locations had an immediate impact on his performance.

McGinnis similarly learned of his transfer on September 25 and testified that being in the unfamiliar territory was humiliating and damaged his performance.

On October 2, 1995, all four officers filed grievances with the Knoxville Civil Service Merit Board alleging that their transfers were in retaliation for the exercise of First

Amendment rights. A stay was ultimately entered and the grievances were not resolved.[1]

In August 1996, Ashe moved F. Potter, Scarbrough, and McGinnis back to their original locations, and McGinnis retired in 1997. In October, 1997, F. Potter was moved back to a forty hour per week position that he continues to hold. This position includes an office comparable to his former office, and allows access to a city vehicle, but involves working a swing shift.

In early 1996, the KFD announced its merit pay awards for 1995. Cureton controlled the merit pay decisions, and neither the plaintiffs nor any other KFD member who supported Harmon received merit pay. The firefighters were again denied merit pay for 1996 and appealed this denial; but Cureton sent them letters stating that the KFD could not respond because merit pay was an issue in litigation. McGinnis testified that at Cureton's deposition, Cureton indicated that none of the firefighters were even considered for merit pay in 1996. The KFD abandoned its merit pay policy after 1996.

On October 24, 1996, the firefighters filed this action in federal district court pursuant to 42 U.S.C. § 1983, alleging that defendants Bruce Cureton, Victor Ashe, Robert Pressley, and the City of Knoxville conspired, through discrimination and retaliation, to violate the firefighters' First Amendment rights of political belief and association. The plaintiffs sought front and back pay, compensatory, nominal, and punitive

1. The evidence remains disputed as to which party brought about the stay of the grievance proceedings.

damages, as well as an injunction, attorney fees, and taxation of costs. In addition, W. Potter sought damages under the FLSA and reinstatement to his prior KFD position; Sharpe also sought a promotion.

On January 7, 1997, the plaintiffs amended their complaint to allege two additional retaliatory acts that occurred since the initial complaint, namely, that Cureton had denied their requests for merit and bonus pay increases for 1996, and Ashe refused to consider a reasonable request to modify their pension plans. The individual defendants moved for summary judgment on qualified immunity grounds; however, the district court denied the motion and this Court affirmed the lower court's decision on interlocutory appeal. *See Sharpe v. Cureton,* 1999 U.S.App. LEXIS 531 (6th Cir. Jan. 13, 1999). The defendants' petition for writ of *certiorari* was denied. *See Cureton v. Sharpe,* 528 U.S. 812 (1999).

A jury trial commenced on January 31, 2000, with the jury returning the following verdicts: Sharpe was awarded $2,500 in compensatory damages because Cureton and Ashe had retaliated against him for filing the complaint; however, he suffered no pre-complaint discrimination; W. Potter was found to have not suffered pre-complaint discrimination, but was awarded $6,500 in compensatory damages from Cureton and Ashe due to retaliation for filing the complaint; Scarbrough was awarded $6,500 in compensatory damages because Cureton and Ashe transferred him and denied a merit pay increase in retaliation for exercising his First Amendment rights, and the jury also found that Cureton retaliated against him for filing the complaint; F. Potter was awarded $7,500

in compensatory damages because Ashe transferred him in 1995 for retaliatory reasons, and Cureton and Ashe also retaliated against him for filing the complaint and denying a merit pay increase; finally, McGinnis was awarded $7,645 due to Cureton and Ashe's retaliation for filing the complaint and in transferring him for retaliatory reasons.

Additional evidence indicated that Ashe was observed crossing out the names of potential new KFD hires recommended by a committee and explained his actions by stating that the crossed-out names were the sons of firemen who had not done much for him during a recent election. In addition, evidence indicated that Ashe had adjusted a promotion committee's 1988 recommendations so that they would promote those who had supported him. Fireman Cummins had supported Ashe in the 1988 election, and the next year was promoted to be a deputy chief, but in 1991 Cummins supported Ashe's competitor and was not promoted thereafter. In 1995, Cummins supported Harmon and was afterwards demoted to his former position and was refused a tuition reimbursement.

The defendants filed motions before, during, and at the close of trial for judgment as a matter of law on the transfer claims due to the statute of limitations. The district court denied the defendants' motions and submitted the statute of limitations issue to the jury, and a finding was reached that the claim was not barred. On February 16, 2000, the court entered judgment enforcing the jury's findings that Cureton and Ashe were liable in their individual capacities and that

the City of Knoxville was liable only for the merit pay portion of Scarbrough and F. Potter's claims.[2]

After the Court's February 16 judgment, the plaintiffs filed a Rule 59(e) motion to alter or amend the judgment to call to the Court's attention that a ruling was still needed on W. Potter's FLSA claim. The plaintiffs also requested in this motion front pay, an injunction against future retaliation and discrimination, and a request for prejudgment interest. A hearing was held on March 28, 2000, and in an April 25, 2000, memorandum opinion, the district court denied the FLSA claim, as well as the request for front pay, an injunction, and prejudgment interest. Also in the court's April 25 opinion, it granted the defendants' renewed motion for a judgment as a matter of law on the transfer claims by finding that the statute of limitations barred these claims because the "continuing violation" doctrine did not apply. Consequently, Scarbrough's damages were reduced to $3,250; F. Potter's damages were reduced to $3,750, and McGinnis ultimately received $1 in nominal damages. On June 5, 2000, the firefighters filed a notice of appeal of the district court's May 8 judgment.[3]

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2. The jury returned a special verdict that allocated damages as follows: Scarbrough received $3,250 for the transfer and $3,250 for the denial of merit pay; F. Potter received $3,750 for each retaliatory action; and McGinnis' entire award of $7,645 was for the illegal transfer.

3. The district court inadvertently failed to enter judgment separately in accordance with Fed.R.Civ.P. 58 on April 25, leading to the judgment issued on May 8, 2000.

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Also after the district court's February 16, 2000, entry of judgment, the defendants filed a motion to tax Sharpe, W. Potter, and Scarbrough the costs of the action incurred by the defendants after December 6, 1996, because these plaintiffs rejected the defendants' Rule 68 offer made on that day that turned out to be larger than the respective jury awards. In addition, the defendants requested that the court award costs incurred by them since November 4, 1997, the date of the Second Rule 68 Offer, and that the court award all of Pressley's costs at the expense of all the firefighters. After the court's decision to grant the defendants' motion for judgment as a matter of law reducing the jury awards, the defendants amended their motion for taxation of costs to request that Scarbrough and F. Potter be made liable for costs after December 6, 1996, since the Rule 68 offer made on that day turned out to be larger than the reduced verdict. On May 8, 2000, the court granted the defendants' requests for taxation of costs and the plaintiffs appeal this decision.

On May 22, 2000, the firefighters filed a second motion to alter or amend the judgment, requesting the district court to reconsider its findings regarding the statute of limitations, the need for an injunction, the dismissal of the FLSA claim, as well as the prejudgment interest and grant of taxation of costs. In a July 26, 2000, memorandum, the district court denied the motion in all respects, except for amending the prior judgment to grant the firefighters' request for an injunction, and to revoke the taxation of defendants' costs under Rule 68. The defendants appeal this Order granting an injunction against future political retaliation by Ashe, and the award to the firefighters of costs against the defendants as "prevailing parties."

Next, on August 8, 2000, the firefighters filed a motion to recover attorney fees in the amount of $365,716, later supplemented to reflect an additional $7,228 in fees incurred since the motion was filed. The district court granted the firefighters' request in part, reducing the total fee award to $241,287. In this Order, appealed by both sides, the district court also reaffirmed its grant of an injunction, and upheld the earlier ruling refusing to impose the defendants' costs on the firefighters pursuant to Rule 68.

Finally, on April 8, 2002, the firefighters filed a motion requesting this Court to consider new facts that had allegedly taken place. Specifically, the firefighters request the Court to consider the results of a grievance filed by a non-plaintiff employee of the Knoxville Fire Department, who complained that the City of Knoxville had discriminated against him in violation of his First Amendment rights of political belief and association.

II. FIREFIGHTERS' APPEAL[4]

A. District Court's Finding That The Continuing Violations Doctrine Does Not Apply To The Transfer Claims

We review the district court's grant of the defendants' motion for judgment as a matter of law *de novo,* applying

4. The defendants' argument that the firefighters' appeal is untimely is rejected because orders or judgments establish the time for filing motions or an appeal, not memorandum opinions. Fed. R. Civ. P. 54(a); Fed. R. App. P. 4(a)(1)(A); *Associated Press v. Taft-Ingalls Corp.*, 323 F.2d 114, 115 (6th Cir. 1963).

the same standard that the district court applied: a court should grant the motion only if "in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Gray v. Toshiba Am. Consumer Prods.*, 263 F.3d 595, 598 (6th Cir. 2001).

As an initial matter, the duration of the statute of limitations for § 1983 actions is governed by state law; however, federal standards govern when the statute begins to run. *See Wilson v. Garcia*, 471 U.S. 261, 267 (1985); *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir.1986). Tennessee law provides for a one year statute of limitations for § 1983 actions. *See* Tenn. Code Ann. § 28-3-104(a)(3); *Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986).

The discriminatory transfers that are the subject of this appeal occurred in September 1995, but the plaintiffs did not file suit until October 24, 1996. Ordinarily, the "discovery rule" applies to establish the date on which the statute of limitations begins to run, *i.e.*, the date when the plaintiff knew or through the exercise of reasonable diligence should have known of the injury that forms the basis of his action. *Sevier*, 742 F.2d at 273. This test is an objective one, and the Court determines "what event should have alerted the typical lay person to protect his or her rights." *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991).[5]

5. In the Title VII context, the Supreme Court has recently noted, without resolving, the accrual issue, specifically, "whether the time begins to run when the injury occurs as opposed to when the injury (Cont'd)

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The district court properly concluded that reasonable minds could not differ that the firefighters had reason to know of the injuries caused by their transfers more than a year before they filed suit. The fact that the firefighters were alerted to the need to protect their rights is evidenced by the October 2, 1995, grievances filed by the firefighters with the Knoxville Civil Service Merit Board, alleging that the transfers were in retaliation for the exercise of First Amendment rights. Accordingly, the district court held that the firefighters' transfer claims were barred due to the fact that the statute of limitations was triggered more than a year preceding the October 24, 1996, date of the lawsuit.

In an effort to sidestep the one year Tennessee statute of limitations, the plaintiffs argue for application of the "continuing violation" doctrine in such a way as to toll the limitations period, rendering the transfer claims timely. The Sixth Circuit has previously recognized two distinct categories of continuing violations, namely, those alleging serial violations and those identified with a longstanding and demonstrable policy of discrimination. *Compare Haithcock v. Frank,* 958 F.2d 671 (6th Cir. 1992) *with Alexander v. Local 496, Laborers' Int'l Union of North America,* 177 F.3d 394 (6th Cir. 1999). Recent Sixth Circuit law summarizes the two categories as follows:

> The first category arises where there is some evidence of present discriminatory activity giving

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reasonably should have been discovered." *National Railroad Passenger Corp. v. Morgan,* 122 S.Ct. 2061, 2073 n.7 (2002). Here, even pursuant to the discovery rule, the plaintiffs' transfer claims remain time-barred.

> rise to a claim of continuing violation such as where an employer continues to presently imposes [sic] disparate work assignments or gives unequal pay for equal work. . . . The second category of continuing violation arises where there has occurred a long-standing and demonstrable policy of discrimination. This requires a showing by a preponderance of the evidence that some form of intentional discrimination against the class of which plaintiff was a member was the company's standing operating procedure.

Burzynski v. Cohen, 264 F.3d 611, 618 (6th Cir. 2001) (internal quotations and citations omitted).

This Circuit employs the continuing violations doctrine most commonly in Title VII cases, and rarely extends it to § 1983 actions. *See, e.g., LRL Properties v. Portage Metro Hous. Auth.,* 55 F.3d 1097, 1106 n.3 (6th Cir. 1995). When a continuing violation is found, "a plaintiff is entitled to have the court consider all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred." *Alexander,* 177 F.3d at 408 (quoting *Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708, 713 (2d Cir. 1996)). The firefighters submit several post-transfer allegedly discriminatory actions as evidence of a continuing violation, specifically, the denial of merit pay (announced in 1996), the refusal to consider plaintiffs for merit pay in 1996, and Ashe's refusal to return the firefighters to their preferred locations.

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Previous "continuing violation" law must be reexamined in light of the Supreme Court's recently imposed limits on the viability of the doctrine. In *National Railroad Passenger Corp. v. Morgan,* 122 S.Ct. 2061, 2070 (2002), the Court held that when an employee seeks redress for discrete acts of discrimination or retaliation, the continuing violation doctrine may not be invoked to allow recovery for acts that occurred outside the filing period. *Id.* at 2072. According to the Supreme Court, "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Id.* In contrast, hostile environment claims involve unlawful employment practices that cannot be said to occur on any particular day, but occur over a series of days or years. *Id.* (citing *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21 (1993)).

Morgan explained, in direct language:

> [D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the

> acts are independently discriminatory and charges addressing those acts are themselves timely filed.

Id. at 2072.

We can find no principled basis upon which to restrict *Morgan* to Title VII claims, and we therefore conclude that the Supreme Court's reasoning must be applied to the firefighter's § 1983 claims.[6] The Supreme Court has previously determined that the Title VII administrative charge period is functionally equivalent to a statute of limitations. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-95, (1982). We are unable to find that the policy justifications for Tennessee's legislative choice to establish a one year statute of limitations period as applicable to § 1983 claims are any less important than the congressional directive set forth in 42 U.S.C. § 2000e-5(e)(1), requiring the prompt filing of Title VII claims.[7] *See Hargraves v. Brackett Stripping*

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6. This Circuit has recently found *Morgan's* construction of the continuing violation doctrine equally applicable to claims of age discrimination and retaliation brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq. See Sherman v. Chrysler Corp.*, No. 00-2287, 2002 WL 31074591 (6th Cir. Sept. 6, 2002). Similarly, a district court in this Circuit recently held that *Morgan* likewise applies to continuing violation claims under 42 U.S.C. § 1981. *See Kinley v. Norfolk Southern Railway Co.*, No. Civ. A. 1999-130, 2002 WL 31499269 (E.D. Ky. Sept. 26, 2002).

7. "[S]trict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Morgan*, 122 S.Ct. at 2070 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). Strict adherence to the procedural

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Machine Co., Inc., 317 F. Supp. 676, 683 (E.D. Tenn. 1970) (holding that the one-year Tennessee statute of limitations does not violate the Due Process Clause as arbitrary and capricious). Moreover, the continuing violation doctrine arose in the context of the "obviously quite short deadlines"[8] set forth in Title VII, and the relatively longer limitations periods provided by states for § 1983 actions reinforces as a policy matter *Morgan's* applicability to these claims.[9] *See Wilson*, 471 U.S. at 279 ("It is most unlikely that the period of limitations applicable to [§ 1983 claims] ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.").

It cannot reasonably be disputed that the firefighters' claims involve discrete acts and not a hostile environment, as they were made aware of the retaliatory transfers on

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requirements specified by the Tennessee legislature similarly guarantees evenhanded administration of the law. *See Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 523 (6th Cir. 1997) ("To allow damages for the entire period during which a law is in effect when a plaintiff challenges the law long after it was enacted would frustrate [the purposes of the statute of limitations]. Instead, just as a new injury was allegedly inflicted on [the plaintiff] each day that [the offending law] was in effect, a new limitations period began to run each day as to that day's damage.") (citation omitted).

8. *Morgan*, 122 S.Ct. at 2070 (citing *Mohasco*, 447 U.S. at 825).

9. *See* Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemp. Probs. 53, 56 (1986).

specific dates in September 1995. The serial violations component of the continuing violations doctrine employed by this Court is sufficiently analogous to the Ninth Circuit line of cases struck down in *Morgan. Tenenbaum v. Caldera,* Nos. 00-2394, 01-1704, 2002 WL 2026347, at *3 (6th Cir. Aug. 29, 2002). Accordingly, *Morgan* overturns prior Sixth Circuit law addressing serial violations, *i.e.,* plaintiffs are now precluded from establishing a continuing violation exception by proof that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period.

The second category of continuing violations, involving a longstanding and demonstrable policy of discrimination, is not implicated by *Morgan. Tenenbaum,* 2002 WL 2026347, at *2 n.3. To establish this category of continuing violation, "appellant must demonstrate something more than the existence of discriminatory treatment in his case." *Haithcock,* 958 F.2d at 679 (citing a discriminatory policy appearing in a statute or an affirmative action plan as examples of this second category). "The preponderance of the evidence must establish that some form of intentional discrimination against the class of which plaintiff was a member was the company's standing operating procedure." *EEOC v. Penton Indus. Publishing Co.,* 851 F.2d 835, 838 (6th Cir. 1988) (citations omitted). Here, the plaintiffs do not represent a class, and have otherwise failed to allege class-wide discriminatory action.[10] The plaintiffs broadly allege, "Ashe's disregard to constitutional rights spans three decades impacting more than these plaintiffs. . . ." This allegation is not sufficiently supported by the record. Knoxville consistently employs over

10. *See infra,* section III. A. (discussing the injunction).

300 firefighters and over 1600 total city employees, but plaintiffs called at trial merely one other retired firefighter who testified concerning allegations of patronage practices occurring in the late 1980's. This proof is insufficient as a matter of law for plaintiffs to meet their burden of showing a three-decade-long "standing operating procedure" of discrimination. Instead, the plaintiffs proved the existence of discriminatory treatment in their case, but this is inadequate to invoke the "longstanding and demonstrable policy of discrimination" continuing violation exception.[11]

Accordingly, we affirm the district court's finding that the continuing violation doctrine does not apply, although based upon the different reasons stated above.

B. W. Potter's FLSA Claim

We review the district court's factual findings regarding this claim against the City of Knoxville for clear error, and its findings of law *de novo*. *Brock v. City of Cincinnati*, 236 F.3d 793, 800 (6th Cir.2001). The FLSA became applicable to the Knoxville Fire Department in April, 1996, and since that time each uniformed member of the Knoxville Fire Department has been compensated by payment of an annual base salary paid in equal bi-weekly installments, and an hourly rate of pay is derived for purposes of determining the regular rate of pay used in computing overtime compensation.

11. As the plaintiffs have declined to argue equitable tolling or estoppel either before or after the announcement of *Morgan*, we have no reason to consider whether *Morgan's* limited endorsement of these equitable doctrines extend to the § 1983 context. *See Morgan*, 122 S.Ct. at 2072 (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984)) (per curiam).

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In April 1996, W. Potter was a Deputy Chief in the firefighting division and worked an average of 56 hours a week. In his shift schedule he worked a maximum of ten and a minimum of nine 24-hour shifts in a 28-day work period. During this time, the Fire Department calculated his hourly rate for purposes of overtime by taking his annual salary and dividing that by 26 (since he was paid bi-weekly), to derive a bi-weekly amount. The bi-weekly amount was then divided by the total number of scheduled hours of work in the bi-weekly pay period. Based upon these calculations, when W. Potter worked ten twenty-four hour shifts, his bi-weekly average was 120 hours, and when he worked nine twenty-four hour shifts, his bi-weekly average was 108 hours.

In September of 1987, W. Potter was transferred to the administrative division and became a Deputy Chief there, working 40 hours per week, and not working any overtime. On September 26, 1995, he was transferred to a new position at which he continued to work 40 hours per week, receiving the same base salary as before, an effective hourly rate of $21.25 per hour. On February 1, 1996, he was transferred to become a shift chief in the firefighting division, which essentially involved reassuming his 1986 position. In this position, he retained his same annual base salary, and his overtime was calculated in the same method as it had been in 1986. This meant that when he worked ten 24-hour shifts his hourly rate for overtime was $15.74, averaging out to $15.18.[12]

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12. When W. Potter first moved to this Shift Chief position, the Fire Department did not pay him any overtime, and instead simply paid him the same salary he had received as an administrator without

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The Fire Department typically determines the number of hours worked for purposes of computing overtime compensation by applying section 207(k) of the FLSA, which exempts fire departments from overtime compensation until the number of hours worked exceeds 212 hours in each 28-day work period. 29 U.S.C. § 207(k). The Fire Department chose not to apply the Section 207(k) exemption to W. Potter when it paid him overtime as Shift Chief; instead, it paid him time-and-a-half at the $15.18 rate for all hours he worked over 40. The result was that W. Potter made more money than the other two Deputy Chiefs who had identical duties. For example, Deputy Chief Palmer was paid $86,645 during the same period that W. Potter was paid $106,674.[13]

W. Potter argues that the Fire Department should have applied the Section 207(k) exemption, and that this would have resulted in a higher hourly rate. According to the Fire Department's method, his bi-weekly base salary was divided by the average number of hours he worked in each bi-weekly period (160), thus arriving at a $15.18 regular rate, plus 64 hours at the time-and-half rate of $22.77, resulting in a total pay per cycle of $3,886.08. In contrast, W. Potter's method calls for dividing his bi-weekly base salary by 80 hours per week, thus arriving at a $21.25 regular rate for 212 regular

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any enhancement. In April, 1996, the Fire Department corrected this error by paying him time-and-a-half for all overtime (based on the $15.18 rate), including a lump sum of back pay overtime beginning February 1, when he had moved into the position.

13. The Fire Department transferred W. Potter back to a 40-hour job in October, 1997.

hours, plus 12 hours at the time-and-a-half rate of $31.88, resulting in pay each cycle of $4,887.56.

The FLSA establishes that employers cannot make employees work more than a specified number of hours per week "unless such employee receives compensation for his employment in excess of [40 hours, unless otherwise provided for,] at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). "Regular rate" is a term of art under the FLSA, defined as:

> The "regular rate" of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract (*Bay Ridge Operating Co. v. Aaron,* 334 U.S. 446 [(1948)]). The Supreme Court has described it as the hourly rate actually paid the employee for the normal non-overtime workweek for which he is employed-an "actual fact." (citation omitted).

29 C.F.R. § 778.108; *see also 149 Madison Ave. Corp. v. Asselta,* 331 U.S. 199, 204 (1947).

The method of calculating the regular rate is as follows: "[t]he 'regular rate' under the Act is a rate per hour," though "[t]he Act does not require employers to compensate employees on an hourly rate basis. . . ." *Id.* § 778.109. "The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment . . . in

any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." *Id.* "Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. . . . A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52." *Id.* § 778.13(b). After calculating the workweek equivalent, the employee's "regular hourly rate of pay, on which time-and-half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate." *Id.* § 778.113(a). Importantly, the "number of hours which the salary is intended to compensate" does not have to be 40 hours; instead, this is a number that is determined by the parties' actual practice. *See, e.g., id.* § 778.325 (providing an example of an acceptable scheme, in which an employee was hired at a fixed salary of $275 for 55 hours of work and his regular rate for purposes of overtime was $5 per hour–indicating that the divisor was 55 rather than 40).[14]

W. Potter's argument is legally indistinguishable from other firefighters' arguments rejected in *Aaron v. City of*

14. *See also 149 Madison Ave. Corp.*, 331 U.S. at 204 ("Section 7(a) of the Act requires . . . that any wage agreement falling within its purview must establish an hourly 'regular rate' not less than the statutory minimum and provide for overtime payments of at least one and one-half times the 'regular rate.' A wage plan is not rendered invalid simply because, instead of stating directly an hourly rate of pay in an amount consistent with the statutory requirements, the parties have seen fit to stipulate a weekly wage inclusive of regular and overtime compensation for a workweek in excess of 40 hours and have provided a formula whereby the appropriate hourly rate may be derived therefrom.").

Wichita, 54 F.3d 652 (10th Cir. 1995). In *Aaron,* the firefighters worked an average of 56 hours per week, or 112 hours bi-weekly, and though they were paid based on the number of hours they worked, the hourly rate was based on a designated "base salary" established in a collectively bargained Memorandums of Agreements ("MOAs"). The MOAs contained pay schedules indicating both bi-weekly salaries and hourly rates, the latter computed on the assumption that the bi-weekly salaries were intended to compensate 112 hours. The *Aaron* firefighters argued that the bi-weekly salary was intended to compensate 80 hours, but the City maintained that the MOAs' practice of using 112 hours to calculate the regular rate was in compliance with the FLSA.

The district court in *Aaron* held that the City's method was wrong, "because overtime hours could not be used in calculating the regular rate. *Id.* at 655. The Tenth Circuit held, however, that "[t]his interpretation is clearly inconsistent with FLSA regulations," " because "[t]he regulations provide that a base salary used to calculate a regular rate can be intended to cover more than 40 hours in one week and the regulations illustrate how to deal with the calculation of the regular rate in such a case." *Id.* (citing the example from 29 C.F.R. § 778.325, *supra*). *Aaron* found the City's method correct:

> The bi-weekly salaries found in the MOAs were intended to cover 112 hours of work for each pay period. Therefore, the regular rate consisted of the MOA-designated bi-weekly salary divided by 112. The MOA bi-weekly salary compensated the firefighters at that rate for up to 112 hours of work.

Appendix A

> If a firefighter worked a total of 112 hours, some of those hours would be considered overtime hours, and therefore, the firefighters would also receive one-half the regular rate for each of those hours. Any hours worked over 112 were all overtime hours and the firefighters would be entitled to one and one-half times the regular rate for those hours. This pay scheme is clearly consistent with the FLSA regulations.

Id.

W. Potter's arguments confuse the concepts of overtime premiums with overtime hours. Further, his reliance upon *Knoxville v. Popejoy,* 1991 Tenn. App. LEXIS 996 (Tenn. Ct. App. Dec. 31, 1991) is misplaced because that case involved review of an administrative interpretation of a City Charter provision under the arbitrary and capricious standard, and did not interpret the FLSA. W. Potter has not identified authority indicating that an unconsented transfer to a lower hourly rate is illegal. The record is devoid of evidence indicating that the City of Knoxville reduced W. Potter's pay "so as to nullify the effect of extending the [FLSA's] coverage." *Cf. Blanton v. Murfreesboro,* 856 F.2d 731, 736 (6th Cir. 1988). W. Potter received higher pay due to the City's choice not to utilize the Section 207(k) exemption than he received in his prior position as an administrator. In addition, he received higher pay in the transferred position than other similarly situated firefighters. Thus, any claim by W. Potter that the city discriminated against him with respect to his wages because he asserted coverage under Section 7 of the FLSA is foreclosed.

Based upon the above reasoning, we affirm the district court's denial of the FLSA claim.

III. APPEAL OF CURETON, ASHE AND KNOXVILLE

A. The District Court Injunction

The court below entered an injunction order stating as follows:

> Mayor Ashe is hereby enjoined from taking any adverse employment actions such as transfers, demotions, refusal to hire, refusal to promote, reduction of compensation or refusal to increase compensation of Knoxville Fire Department firefighters on account of their political beliefs and associations or their choice to remain neutral in political matters. This injunction shall not apply, however, to any Knoxville Fire Department employees who are not covered by the city's civil service regulations.

We review the district court's decision to grant an injunction for abuse of discretion; legal conclusions leading to the injunction are reviewed *de novo,* and factual conclusions are reviewed for clear error. *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir. 1998). "Where the plaintiff establishes a constitutional violation after a trial on the merits, the plaintiff will be entitled to permanent injunctive relief upon showing 1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law." *Id.* (citations omitted).

The district court should grant an injunction only where the dilemma is ripe for judicial resolution, and "a matter is considered premature for judicial review when the alleged injury is speculative or may never occur." *Id.* at 1068 (citations omitted). Finally, the injunction "may be no broader than necessary to remedy the constitutional violation." *Id.* at 1069 (citations omitted).

The district court issued the injunction only after the firefighters filed a motion to alter or amend the court's April 25, 2000, decision to deny the request for an injunction. The court originally denied the request by stating:

> In light of the fact that the plaintiffs are adequately protected by the laws and regulations of the City of Knoxville, that Mayor Ashe cannot serve as mayor beyond his current term, that former chief Bruce Cureton has retired, that Deputy Chief Pressley was found not to have violated any of the plaintiffs' civil rights, that plaintiffs, Frank Potter, Kenneth Scarbrough, and William McGinnis were transferred back to their favored stations in August, 1996 during the pendency of their civil service grievances, that the merit pay system has been discontinued, and that Mayor Ashe has conceded that it was wrong for him to transfer Frank Potter, the undersigned finds that the plaintiffs have not demonstrated a substantial likelihood of future injury for which injunctive relief is warranted.

The court below altered its ruling denying the injunction for the following stated reasons: in order to deter Ashe's

future unconstitutional actions; due to the inadequacy of money damages; that Ashe has refused to admit the unconstitutionality of his actions; that future retaliation would not be grievable before the Civil Service Merit Board; due to evidence that Ashe had been engaging in similar discriminatory behavior from the beginning of his term; and evidence that a firefighter benefitted from political favoritism by a previous administration.

As an initial matter, the injunction grants class-wide relief to all Knoxville firefighters, despite the fact that the firefighters never sought nor received class certification. The injunction is limited to Ashe, over whom the court properly had *in personam* jurisdiction; however, the operative question for review is the extent to which the class-wide injunction burdens Ashe. While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an *individual suit,* such broad relief is rarely justified because injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs. *See Califano v. Yamasaki,* 442 U.S. 682, 702 (1979); *Aluminum Workers Int'l Union Local Union No. 215 v. Consol. Aluminum Corp.* 696 F.2d 437, 446 (6th Cir. 1982) ("Precisely because equitable relief is an extraordinary remedy to be cautiously granted, it follows that the scope of relief should be strictly tailored to accomplish only that which the situation specifically requires and which cannot be attained through legal remedy.")

The injunction issued by the district court is overly broad in that the class wide focus is completely unnecessary to provide the named plaintiffs the relief to which they are

entitled as prevailing parties. *Cf. Brown v. Trustees of Boston University,* 891 F.2d 337-361 (1st Cir. 1989) ("An injunction should be narrowly tailored to give only the relief to which plaintiffs are entitled. Ordinarily, class-wide relief, such as the injunction here which prohibits sex discrimination against the class of Boston University faculty, is appropriate only where there is a properly certified class. . . . But there is no such reason here for an injunction running to the benefit of nonparties. Professor Brown's case established that she alone had been the victim of sex discrimination. The only permissible focus of the injunctive relief, therefore, would be on protecting her from further instances of sex discrimination or retaliation. . . .") (citations omitted). Regardless, the non-party class of firefighters established by the language of the injunction have access to the City's grievance process and the right to file suit to remedy any potential future harm without the necessity of an injunction.

The district court's decision to grant the injunction is not based upon a requisite factual showing of likely future irreparable harm. The only post-suit retaliation alleged involved the January 1997, decision not to consider the plaintiffs for merit pay. The defendants consistently maintain that this decision, now made almost six years in the past, was on the advice of counsel due to the pending litigation. In addition, the merit pay system has been abolished in Knoxville since 1997, and there is thus little likelihood of future retaliation by merit pay decisions. The legal arguments of Ashe's counsel do not provide a factual predicate for likely future irreparable harm, nor does Ashe's refusal to issue a post-trial public apology, as the law does not require such a gesture by a defendant in order to avoid an injunction.

The district court correctly emphasized in its initial decision denying the injunction the lack of a substantial likelihood of future injury given that: the firefighters were transferred back to their favored locations; Ashe was prohibited from seeking another term in office (and now has less than one year remaining in his last term), and Cureton is no longer available to carry out any retaliation orders due to his retirement. The district court's initial decision denying the injunction was correct. For the above reasons, the injunction is reversed as overly broad, and unnecessary in any event because the firefighters have failed to establish a sufficient likelihood of future harm, and that any future harm would be irreparable.[15]

B. Defendants' Rule 68 Offers

Federal Rule of Civil Procedure 68 provides, in pertinent part, that "a party defending a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after

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15. On the basis of *Guarino v. Brookfield Township Trustees,* 980 F.2d 399, 404 (6th Cir. 1992), we deny the firefighters' April 8, 2002, motion requesting the Court to consider certain newly emerged facts not considered by the district court. The firefighters' reliance upon the unpublished opinion of *Van Meter v. Shriver,* 1986 U.S. App. LEXIS 23006 (6th Cir. Feb. 6, 1986) is misplaced because that case involved new facts relating to justiciability and not the substantive merits of the action. *See Van Meter,* at *4 ("this litigation bristles with difficult questions of standing, mootness, ripeness, comity, and federalism.").

the making of the offer." Fed. R. Civ. P. 68. In a § 1983 action, Rule 68 costs include the plaintiff's own attorney fees; thus, when the Rule 68 offer is ultimately greater than the award, the plaintiff may not recover attorney fees from the defendant. *Marek v. Chesny,* 473 U.S. 1, 11 (1985); *Mallory v. Eyrich,* 922 F.2d 1273, 1278 (6th Cir.1991). "Operation of Rule 68 is mandatory," and [t]he district court retains no discretion under Rule 68 to alter the rule's sometimes severe application." *Hopper v. Euclid Manor Nursing Home, Inc.,* 867 F.2d 291, 295 (6th Cir. 1989).

On December 6, 1996, the defendants made timely Rule 68 offers to each of the firefighters, and the firefighters rejected them. On November 4, 1997, the defendants made second offers to all the firefighters except for W. Potter, and these too were rejected. Only the jury awards in favor of Scarbrough and F. Potter exceeded the sums specified in the offers, and when the district court subsequently eliminated the transfer claim recoveries on statute of limitations grounds, the Rule 68 offers to each individual plaintiff exceeded each individual jury award. The district court then ordered all the firefighters to pay the defendants' costs subsequent to December 6, 1996. After the firefighters filed a second motion to alter or amend the judgment, the district court altered the previous ruling, adopted the firefighters' argument that the offers were void for vagueness, revoked the award of costs, declared the firefighters "prevailing parties" and granted their request for attorney fees.

The plaintiffs attempt to escape the mandatory operation of Rule 68 by arguing that the defendants' offers were void for vagueness and thus incapable of being accepted. Contract

principles apply to Rule 68 offers, and a plaintiff contesting the validity of a Rule 68 offer may assert contractual defenses. *Mallory,* 922 F.2d at 1279. Apparently, due to a dearth of Sixth Circuit law addressing the specificity required for Rule 68 offers, the district court borrowed the basic standard from *Gavoni v. Dobbs House, Inc.,* 164 F.3d 1071, 1075-76 (7th Cir. 1999), which held that "[t]he defendant must show that the offer was more favorable than the judgment and that the mandatory cost-shifting provision was therefore triggered." (citations omitted). Specifically, "[t]here must ... be a clear baseline from which plaintiffs may evaluate the merits of their case relative to the value of the offer." *Id.* at 1076. (citations omitted).

W. Potter's offer was customized for him; the other four offers provided for two-step merit pay increases, and in some cases, promotions with accompanying back-dated pay increases; an agreement not to discriminate in the future; payment of attorney fees and costs to date; and a specified-sum payment for damages.

The district court invalidated the offers in part because actual dollar figures were not provided to the firefighters until after trial. The Fire Planning and Operations Manager of Knoxville calculated the value of the Rule 68 offers to the plaintiffs, if they had accepted them, up to the pay period ending January 29, 2000. The district court found that the pre-trial offers failed to set forth clearly defined terms upon which there could be a meeting of the minds. To buttress this conclusion, the court cited a phone call allegedly made by the firefighters' attorney to one of defendants' attorneys five days after the December 6, 1996, offer of judgment, and

a letter sent to the defendants one day after the November 4, 1997, offer of judgment seeking to discuss the offer.

The firefighters' pleas of ambiguity are a thinly-veiled attempt to avoid the mandatory application of Rule 68 in this case, due to the admittedly severe effect the rule has on plaintiffs' attorney fee award. It is undisputed that under the Knoxville merit pay system that a one-step pay increase results in an increase in the recipient's pay by 2.5%, beginning the day the pay increase becomes effective. The defendants' offer providing for a two-step increase would correspondingly result in a 5% pay increase. The veteran firefighters, having the benefit of years of experience with the Knoxville merit pay system and having received previous step increases throughout their careers, were fully familiar with the pay step system, as reflected in their trial testimony. *See Said v. Virginia Commonwealth University,* 130 F.R.D. 60, 63 (E.D. Va. 1990) (approving use of terms of art commonly known to the parties in the offer of judgment). These offers did not lump together a sum for the plaintiffs to allocate among themselves; instead, separate offers were made to each firefighter, and the offers did not lump together the damages portion with the award of costs. *Cf. Marek,* 473 U.S. at 5-6. Thus, the relative comparisons of the increase among each firefighter is of no moment, as each firefighter could determine his own increase if he accepted the offer.

Likewise, the offer of a promotion is free from ambiguity, and the plaintiffs were well aware that the salary increase would be reflected on their bi-weekly pay check during the duration of their careers, and in their pensions, which reflected 50% of their salary. The 5% pay increase specified

to be effective eleven months earlier than the offer obviously includes "back pay." In addition, the offers made clear that the pay increase was effective on the exact date it became effective for all other firefighters who received the merit pay at issue, January 7, 1996.

The letter from plaintiffs' attorney to defense counsel is more accurately construed as a bargaining tool seeking additional terms, and not a request for clarification.[16] Regardless, the letter tellingly refers to the step increases in similar fashion to the defendants' offer, without mentioning specific dollar amounts or requesting monetary clarification, further revealing the plaintiffs' familiarity with the meaning of such an increase. The district court's conclusion that "[t]he defendants could have refined their offers of proof in response to plaintiffs' inquiries but they did not do so" incorrectly implies that Rule 68 requires the offer to be normatively acceptable to the plaintiff, instead of merely sufficiently clear as to allow the plaintiffs to understand the terms. The letter did not ask for *clarification* of the monetary part of the offers; it merely sought *refinement* of the injunctive part.

As for W. Potter's offer, step increases were not at issue because he was serving at the highest possible step of his rank. The plaintiffs' argument that it was indefinite because it did not specify the rate of pay for the first 40 hours of the

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16. For example, the plaintiffs' letter attempts to alter the language of the defendants' unambiguous offer to not discriminate in the future. Dickering or subjective dissatisfaction with the terms of an offer does not render the offer ambiguous, and cannot alleviate the mandatory operation of Rule 68.

week is not well taken. All uniformed members of the Knoxville Fire Department, including W. Potter, are salaried employees compensated on the basis of an annual base salary paid in bi-weekly installments. The offer further specified the overtime compensation rate in compliance with the Fair Labor Standards Act.

In sum, the defendants' Rule 68 offers are not void for vagueness; the offers were sufficiently definite to create the power of acceptance in the firefighters, triggering the mandatory application of Rule 68. Both the district court, as well as this Court, are without equitable discretion to alter the effect of Rule 68. Accordingly, the district court's award of attorneys' fees is vacated and the matter is remanded for a determination of the plaintiffs' fees reasonably incurred before the offer of judgment on December 6, 1996.[17]

IV. CONCLUSION

For the above reasons, we affirm the district court's finding that the continuing violation doctrine does not apply; affirm the denial of the FLSA claim; vacate the injunction; reverse the Rule 68 decision; vacate the entry of attorney fees; and direct the district court on remand to issue a finding regarding attorney fees reasonably incurred by the plaintiffs' attorneys before December 6, 1996.

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17. The plaintiffs do not dispute that Rule 68 is operable in that the final judgments are less than the amount of the offers.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-5805; 00-6089; 00-6361; 00-6362

GARY G. SHARPE; WILLIAM G. POTTER; KENNETH F. SCARBROUGH; FRANK E. POTTER; WILLIAM H. McGINNIS,

Plaintiffs - Appellants/Cross-Appellees (00-5805/6089),
Plaintiffs - Appellees/Cross-Appellants (00-6361/6362),

v.

BRUCE CURETON, Chief, in his individual and official capacities; VICTOR ASHE, Mayor, in his individual and official capacities; CITY OF KNOXVILLE,

Defendants - Appellees/Cross-Appellants (00-5805/6089),
Defendants - Appellants/Cross-Appellees (00-6361/6362),

ROBERT PRESSLEY, Deputy Fire Chief, in his individual and official capacities,

Defendant - Appellee (00-5805),
Defendant (00-6089),
Defendant - Cross-Appellee (00-6361/6362).

Before: NORRIS and BATCHELDER, Circuit Judges;
FORESTER, Chief District Judge.

Appendix A

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED, accordingly:

1) the district court's finding that the continuing violation doctrine does not apply is AFFIRMED;

2) the district court's denial of the Free Labor Standards Act claim is AFFIRMED;

3) the district court's grant of an injunction is VACATED per abuse of discretion;

4) the district court's decision as to Federal Rule of Civil Procedure 68 is REVERSED;

5) the district court's entry of attorney fees is VACATED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF TENNESSEE DATED AND FILED SEPTEMBER 20, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-916
(MURRIAN)

GARY G. SHARPE, et al.,

Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, et al.,

Defendants.

MEMORANDUM OPINION

The plaintiffs are the prevailing parties in this civil rights case and are therefore entitled to costs and attorneys' fees pursuant to 42 U.S.C. § 1988(b).[1] The underlying

1. Section 1988(b) provides, in pertinent part, as follows:

> In any action or proceeding too enforce a provision of section[ ] . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

litigation has been complicated, extended and contentious.[2] The plaintiffs, all Knoxville, Tennessee, firefighters or former firefighters, ultimately obtained a compensatory damage award of $16,001 and a permanent injunction against the Mayor of the City of Knoxville enjoining the mayor from discriminating against Knoxville firefighters on account of their political associations.

In keeping with the tenor of the entire lawsuit, the issues surrounding the award of attorneys' fees and costs are complicated, tedious, and contentious.

The following motions and requests are pending:

1. the plaintiffs' motion for attorneys' fees and associated expenses [Doc. 362];

2. the defendants' opposition to the plaintiffs' motion for attorneys' fees and associated expenses and defendants' motion to reconsider the court's July 26, 2000, Memorandum Opinion [Doc. 371];

3. the plaintiffs' motion to strike the affidavit of Robert Crossley [Doc. 372]; and,

4. plaintiffs' bill of costs [Doc. 358].

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2. The undersigned used six verdict forms to ask the jurors 93 questions.

Appendix B

I. *Defendants' Motion to Reconsider the July 26, 2000, Memorandum Opinion*

The defendants seek reconsideration of the undersigned's ruling in the July 26, 2000, Memorandum Opinion to the effect that the Fed. R. Civ. P. 68 offers of judgment are not binding on the plaintiffs. This motion was filed August 29, 2000. It is therefore untimely. This case is on appeal and the defendants had just 10 days in which to file a motion to alter or amend judgment. Fed. R. Civ. P. 59(e).

> Rule 59 provides that motions to reconsider—nowadays correctly styled either motions for new trial or motions to alter or amend—"shall be filed no later than 10 days after entry of judgment," Fed. R. Civ. P. 59(b), (e), and most courts have concluded that the 10-day filing requirement is jurisdictional. . . . In other contexts, our own precedent dictates that a Rule 59 motion filed outside the mandatory 10-day window is of no effect.

Feather v. Chevron U.S.A., Inc., 141 F.3d 264, 268 (6th Cir. 1998) (citations omitted).

Final judgment entered in this case on July 26, 2000 [Doc. 357]. The instant motion was not filed until August 29, 2000, and therefore if construed as a Rule 59 motion, it is of "no effect."

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"Where a party's Rule 59 motion is not filed within the mandatory 10-day period, it is appropriate for a court to consider the motion as a motion pursuant to Rule 60 for relief from judgment." *Id.*[3] The standard for Rule 60 relief is considerably higher than for Rule 59 relief. *Id.* This court does not retain jurisdiction to decide a Rule 60(b) motion where a notice of appeal is filed before the court decides the motion. *Securities and Exchange Commission v. Johnson*, 143 F.3d 260, 263 (6th Cir. 1998); *Pittock v. Otis Elevator*

3. The pertinent part of Rule 60 provides:

> (b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Co., 8 F.3d 325, 327 (6th Cir. 1993). The defendants filed their notice of appeal on August 4, 2000 [Doc. 359].

The defendants' Rule 59 "motion to reconsider" will be denied.[4]

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4. The defendants contend that the court exceeded its authority by imposing an injunction on Mayor Ashe. The defendants cite *Hopper v. Euclid Manner Nursing Home. Inc.*, 867 F.2d 291 (6th Cir. 1989) for the proposition that it is an abuse of discretion to modify a judgment for the purposes of avoiding the harsh effects of a Rule 68 offer of judgment. First of all, Rule 68 itself provides that such offers cannot be considered when deciding any issue but costs. Secondly, it is suppositional on the defendants' part to assume that the court changed its position and imposed an injunction in order to avoid the operation of Rule 68 in this case. The court acted pursuant to a timely filed Rule 59(e) motion to alter or amend judgment and set out the reasons for reversing the April 25, 2000, decision denying injunctive relief. Memorandum Opinion filed July 26, 2000 [Doc. 356]. Although the value of injunctive relief must be considered when comparing the plaintiffs' recovery to the Rule 68 offers, *see* 13 *Moore's Federal Practice* § 68.07[3] (3d ed. 1998), the undersigned did not rely on the value of the injunction in rejecting the Rule 68 offers. The offers were simply too indefinite and vague to be binding. None of the reasons given by the court to support the injunction included the effect of an injunction on the Rule 68 offers. The defendants do not accept the fact that injunctive relief is appropriate under the facts and law of this case; rather, they speculate that the court's imposition of injunctive relief was a somewhat disingenuous effort to rescue plaintiffs from the effects of Rule 68. The defendants more or less publicly claimed "victory" through their attorneys shortly after the jury verdict was in because the size of the damage award was relatively small, because no punitive damages were awarded and publicly stated through one of their lawyers that

(Cont'd)

Appendix B

II. *The Plaintiffs' Motion for Attorneys' Fees and Associated Expenses*

A. *Background and Contentions*

The plaintiffs moved in a timely manner for an award of attorneys' fees and associated expenses on August 8, 2000. 42 U.S.C. § 1988(b); 28 U.S.C. § 1920; Fed. R. Civ. P. 54(d).

The plaintiffs contend that they have incurred substantial attorneys' fees and expenses during the pendency of this case; that those fees and expenses were increased needlessly due to defendants' vexatious tactics, pretrial appeal, unsuccessful petition for rehearing on appeal, and unsuccessful petition for certiorari to the United States Supreme Court.

(Cont'd)

the jury was "wrong." They continue to characterize this lawsuit as one "where the **only** injury involved lateral transfers and denial of modest, quantifiable merit pay." *See, e.g.*, Affidavit of Robert H. Watson, Jr. [Attachment to Doc. 371] (emphasis added). These factors reinforce the need for injunctive relief in this case. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes **irreparable injury.**" *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1973) (emphasis added). Retaliating against public employees because they have exercised their First Amendment right to political association is no trivial matter under our Constitution and laws. The defendants also contend that the court exceeded its authority by granting to the plaintiffs injunctive relief which extends to all Knoxville firefighters. It is true that this was not a class action but no direct relief was granted to any class. The court had in *personam* and subject matter jurisdiction over the mayor and it is he who is enjoined.

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The plaintiffs point out that the jury found ten separate violations of the plaintiffs' civil rights by the defendants. They argue that they should recover their fees and expenses associated with proceedings before the City of Knoxville's Civil Service Merit Board. At the very least, they argue that the court should award those fees which were necessary to the preparation for trial and which were used to successfully prosecute their case (such as depositions, research, and discovery that would have had to occur in order to proceed with this lawsuit in any event).

The defendants oppose the fee petition on a number of grounds. They argue that the fee petition should be denied because it was not filed within 14 days of the court's April 25, 2000, order. Fed. R. Civ. P. 54(d). They concede, however, that the court has already ruled that the April 25 order was not a final, appealable order. Memorandum Opinion filed July 26, 2000 [Doc. 356]. The final appealable order in this case was filed July 26, 2000, and the instant petition for attorneys' fees and associated costs was timely filed on August 8, 2000 [Docs. 357, 362]. This contention is without merit.

Defendants next contend that plaintiffs are not entitled to attorneys' fees incurred during the civil service grievance hearing process; that plaintiffs are not entitled to any attorneys' fees or costs incurred after plaintiffs' rejection of defendants' Rule 68 offers; that even assuming defendants' Rule 68 offers do not bar plaintiffs' recovery of post-offer fees and/or costs, the plaintiffs are not entitled to post-trial attorneys' fees or costs or, alternatively, those fees and costs should be reduced to reflect their limited success on post-trial

issues; that plaintiffs are not entitled to attorneys' fees/costs in this action for work associated with a collateral suit filed in state court; the fee petition and request for associated expenses are unreasonable; and many of the expenses sought by the plaintiffs should be rejected. I will take the defendants' objections up in the order stated.

B. *Attorneys' Fees — Civil Service Proceedings*

The party seeking an award of fees has the burden of proof to establish entitlement to the fees. *Webb v. Board of Education of Dyer County, Tennessee*, 471 U.S. 234, 242, 105 S.Ct. 1923, 1928 (1985).

The plaintiffs filed grievances with the City of Knoxville Civil Service Board before filing this suit. There is some dispute about why the grievance procedures were not completed. In any event, the grievances never made it to a hearing before a hearing officer. Plaintiffs William Potter, Frank Potter, Ken Scarbrough and William McGinnis filed grievances with the Knoxville Civil Service Board alleging that retaliatory actions had been taken against them on account of their non-support of Mayor Ashe in the 1995 election. Mr. Sharpe became involved in February, 1996 when he filed his grievance with the board alleging failure to promote him and denial of merit pay based upon political patronage.

The plaintiffs contend that a number of discrete tasks were undertaken during the administrative hearing which were essential to the overall preparation and success of this case. *See* Exhibits 1 and 2 to Doc. 362. The plaintiffs contend that the work undertaken by their attorneys during the

grievance process constituted crucial discovery and investigation which would have been necessary to prepare the complaint and prepare for trial whether or not the grievances had been filed.

Plaintiff Gary Sharpe claims that he should be awarded $3588.50 in attorneys' fees for "discrete tasks" associated with the grievance proceedings. The other plaintiffs claim $2H6.00 in attorneys' fees for such "discrete tasks."

In *New York Gaslight Club v. Carey*, 447 U.S. 54, 100 S.Ct. 2024 (1980), the court held that attorneys' fees could be awarded to a prevailing plaintiff for work performed pursuing a state administrative remedy "to which the complainant was referred pursuant to Title VII" of the Civil Rights Act of 1964. *Id.* at 71, 100 S.Ct. at 2034. The court noted that the complainant was required to pursue available state remedies under Title VII before going to federal court. *Id.* at 64-65, 100 S.Ct. at 2031. It is not disputed that in the instant case, the plaintiffs did not have to exhaust their civil service remedies before filing suit.

In *Webb v. Board of Education of Dyer County, Tennessee*, 471 U.S. 234, 105 S.Ct. 1923 (1985), the plaintiff, an African-American school teacher, sued the county school board under 42 U.S.C. § 1983 for allegedly discharging him on account of his race. He had pursued administrative remedies with an attorney before filing suit in federal court. The case was settled while pending in federal court but the district court and the Sixth Circuit would not allow the plaintiff his attorney fees which were generated pursuing the administrative claim. The Supreme Court affirmed.

It distinguished *Carey* by saying that the administrative remedies in a Title VII case are mandatory but § 1983 does not require exhaustion of remedies. *Id.* at 240-41, 105 S.Ct. at 1927. In the administrative hearing the plaintiff had sought to enforce teacher tenure rights created by state law and not rights under § 1983.

The court held that "[t]he time that is compensable under § 1988 is that 'reasonably expended *on the litigation.*'" *Id.* at 242, 105 S.Ct. at 1928 (emphasis in the original). The administrative proceedings concerning the plaintiff's tenure rights were not part of the § 1983 proceeding.

The court noted that the amount of attorney's fees to be awarded depends on the facts of each case. *Id.* The court left the door open for awarding attorney's fees to a prevailing plaintiff under § 1988 even where the administrative proceedings are not mandatory.

> Of course, some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed "on the litigation." Most obvious examples are the drafting of the initial pleadings and the work associated with the development of the theory of the case. . . . The petitioner made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement.

Id. at 243, 105 S.Ct. 1928-29 (footnote omitted). On the record before the court in *Webb*, the court was being asked to award attorney's fees for all administrative work regardless of whether it advanced the civil rights litigation. The court upheld the district judge's discretionary decision to deny attorney's fees for all of the administrative proceedings.

Counsel for the plaintiffs in the instant case, however, have done their homework. They have broken out discrete portions of the work done during the administrative process which they say supported the civil rights litigation. It must be remembered that unlike the *Webb* case, the plaintiffs' theory from the outset of the administrative proceedings has been that four of them were transferred in September, 1995 in retaliation for their exercise of their right under the First Amendment not to support Mayor Ashe. For example, William Potter's grievance filed October 2, 1995, stated that he had been transferred "as a result of my exercise of First Amendment rights. . . ." Defendants' Exhibit 202. Kenneth Scarbrough's grievance filed that same date complained that he had been transferred "because I supported Ivan Harmon in the last Mayor's race." Joint Exhibit 5.

Although the court has held that the September, 1995 transfer claims are barred by the statute of limitations, they would have been admissible as evidence relevant to the other claims.

The plaintiffs' attorneys have exercised billing judgment and have highlighted the discrete portions of their administrative work which supported this civil rights litigation. I have reviewed these entries and find that I have

no basis for disagreeing with the billing judgment of plaintiffs' counsel.

I find that under the particular facts of this case, the discrete tasks identified by plaintiffs' counsel fit the mold of work "both useful and of a type ordinarily necessary to advance the civil rights litigation. . . ." *Webb*, 471 U.S. at 243, 105 S.Ct. at 1928.

The fact that no resolution of the grievances was ever made does not mean that the compensation claimed here was not spent on the litigation. That, and whether the time spent was reasonable, are the keys. *Id.* at 242, 105 S.Ct. at 1928.

The defendants argue that plaintiffs must not believe that the work performed in connection with the civil service proceedings was useful or necessary to advance the civil rights litigation since plaintiffs duplicated most of the depositions after filing suit in this court. The defendants argue that plaintiffs engaged in time consuming, expensive discovery which duplicated all those "discrete tasks" for which the plaintiffs now want to collect attorney fees.

This argument goes to the overall question of which of the hours of attorney time were **reasonably** expended on the litigation. *See* 42 U.S.C. § 1988(b). That will be addressed below.

The plaintiffs will be allowed attorneys' fees for work performed during the administrative process as follows:

Gary Sharpe:	$3588.50
The other plaintiffs:	$2116.00

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C. *Rejection of the Rule 68 Offers*

For the reasons stated in Part I, above, and in the Memorandum Opinion filed July 26, 2000, the Rule 68 offers were not binding on plaintiffs and do not affect the plaintiffs recovery of reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.

D. *Post-Trial Attorneys' Fees and Costs*

The defendants argue that the following "post-trial" matters deserve special attention: (1) limited success with respect to injunctive relief, (2) no monetary damages with respect to the four separate 1995 transfers, (3) no prejudgment interest, (4) no front pay, and (5) denial of William Potter's Fair Labor Standards Act claim. Defendants argue that the injunction is of little value and point out that the court struck the damages awarded for the September, 1995 transfers, and plaintiffs lost on the other three claims. Thus, they argue, little or no attorneys' fees should be awarded for this work.

I will consider this aspect of defendants' objections in connection with the analysis of reasonableness of the fees and expenses requested for the entire litigation set out below in Part II. F. The case should not be divided into parts, including a "post-trial" segment. The trial was not over until the FLSA claim was tried non-jury and the post-trial motions were decided. Moreover, the court must look at the entire litigation in judging what attorneys' fees and expenses to award.

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There can be no doubt that plaintiffs are the "prevailing parties" in this litigation. They did not achieve complete success in this litigation but "the degree of the plaintiffs' success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for the fee award at all." *Texas State Teachers Assoc. v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486 (1989).

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought . . . or comparable relief through a consent decree or settlement. . . . Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. . . . Otherwise the judgment or settlement cannot be said to affec[t] the behavior of the defendant toward the plaintiff. . . . Only under these circumstances can civil rights litigation effect the material alteration of the legal relationship of the parties and thereby transform the plaintiff into a prevailing party. . . . In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. 103, 111-112, 113 S.Ct. 566, 573 (1992) (several internal quotations omitted, citations

omitted). All five plaintiffs clearly meet this definition of "prevailing party." Even William McGinnis, who is retired from the Knoxville Fire Department, meets the definition because an award of nominal damages satisfies the test, *Farrar*, 506 U.S. at 112, 113 S.Ct. at 573. Moreover, he is a pensioner from the city and he prevailed on his claim for injunctive relief, thereby protecting him from possible retaliation through his pension status.

> Once civil rights litigation materially alters the legal relationship between the parties, the degree of the plaintiff's overall success goes to the reasonableness of a fee award. . . . Indeed, the most critical factor in determining the reasonableness of a fee award is the degree of success obtained. . . . We have already observed that if a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount.

Id. at 114, 113 S.Ct. at 574 (internal quotations and citations omitted).

For these reasons, plaintiffs' "post-trial" fees and expenses will not be considered separately from fees and expenses for the entire litigation.

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E. *Collateral Suit in State Court*

The plaintiffs filed suit in Knox County Chancery Court seeking the contemporaneous time records prepared by counsel for the city. The plaintiffs claim fees for the Chancery Court action in the amount of $2485.00 and costs for that action in the amount of $147.10. Exhibit 6 to Doc. 320.

The plaintiffs argue that they had to file suit because the city would not turn over the time records pursuant to a Freedom of Information request. The purpose of obtaining the billing records was to use them to try and illustrate that plaintiffs' fees are reasonable.

Plaintiffs cannot recover these fees and costs in this court. They had their chance to recover costs in the Chancery Court action. Whether attorneys' fees would be recoverable in that action is governed by state law. That was separate litigation from this civil rights litigation. "The time that is compensable under § 1988 is that reasonably expended *on the litigation.*" *Webb*, 471 U.S. at 242, 105 S.Ct. at 1928 (emphasis in original, internal quotations omitted).

This claim for attorneys' fees and other costs will be denied.

F. *The Reasonableness of the Fees Requested*

An attorneys' fee award must be "attuned to the degree of success obtained." *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257-258 (6th Cir. 1993).

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In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), the Supreme Court set forth considerable guidance for courts determining a "reasonable" fee. *Hensley* dealt with an award of attorney's fees pursuant to 42 U.S.C. § 1988.

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. . . .
>
> The district court also should exclude from this initial fee calculation hours that were not "reasonably expanded." S. Rep. No. 94-1011, p. 6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original).

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> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 433-434, 103 S.Ct. at 1939-40. In the instant case, all of the plaintiffs claims, with the exception of the FLSA claim, were closely related in the sense that they involved an over-arching claim that the defendants did what they did to retaliate against the plaintiffs for failing to support Mayor Ashe in the 1995 election and then retaliated against them for bringing their dispute to federal court.

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of

discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. . . .

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Application of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is

> lengthy and demands many hours of lawyers' services. Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved. . . .
>
> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Hensley, 424 U.S. at 435-437, 103 S.Ct. at 1940-1941.

The amount of the plaintiff's damage award at trial is not controlling in determining the amount of reasonable attorney's fees. *McHenry v. Chadwick*, 896 F.2d 184, 189 (6th Cir. 1990), citing *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686 (1986). In *McHenry*, *supra*, the court approved an award of attorney's fees that was more than five times the amount of damages awarded to Mr. McHenry. *See Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997) (Damages capped at $300,000 and attorney's fees of $430,752.28 awarded. No injunctive relief awarded), *cert. denied*, 119 S.Ct. 64 (1998); *Adcock-Ladd v. Secretary of Treasury*,

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__ F.3d __, No. 99-5414 (6th Cir., decided and filed June 15, 2000) (Title VII case in which $260,492.50 in attorney's fees were awarded, including approval of a $300 per hour rate for a Washington, D.C. lawyer for pretrial work and additional compensation for his work on appeal at that rate. The case settled for $320,810.07, but no injunctive relief granted); *see also Riverside*, 477 U.S. at 564-67, 106 S.Ct. at 2689-91 (Appellate court confirmed award in excess of $245,000 in attorneys' fees to civil rights plaintiffs who recovered $33,350 in damages); *Duckworth v. Whisenant*, 97 F.3d 1393 (11th Cir. 1996) (award of $162,209 in attorneys' fees was proper despite an award of $10,500 in compensatory and punitive damages); and Estate of *Borst v. O'Brien*, 979 F.2d 511, 516-17 (7th Cir. 1992) (attorneys' fee 47 times as great as damage award was held not excessive because the amount of the award, taken alone, did "not represent the full value achieved by litigation vindicating one's civil rights.").

In determining whether hours are reasonably billed,

> [t]he question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed.

Woolridge v. Marlene Industries Corporation, 898 F.2d 1169, 1177 (6th Cir. 1990), *reh'g and reh'g en banc denied, id.*

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This is a case which should not be viewed as a series of discrete claims except that the FLSA claim will be treated as a discrete claim. The overriding issues were whether the defendants violated the plaintiffs' First Amendment rights to freedom of political association and then retaliated against them for pursuing their rights in federal court. The Fair Labor Standards Act claim was somewhat related to the plaintiffs' overall theory of the case in that plaintiffs claimed that Chief Potter was singled out for different treatment under the FLSA than others in the firefighters' division because of his failure to support the mayor. Nonetheless, I believe it should be treated as a discrete claim for purposes of attorneys' fees.

Although the plaintiffs did not prevail on some claims, *e.g.* the September, 1995 transfers, Gary Sharpe's promotion, William Potter's transfer to the firefighting division, the plaintiffs succeeded in their overall goal in proving that they had been singled out for unlawful discrimination and retaliation because they did not support the mayor in the 1995 election and because they went to federal court to vindicate their First Amendment rights. They were also ultimately successful in obtaining injunctive relief to protect those rights. The court must therefore focus on the significance of the overall relief obtained by the plaintiffs in relation to the hours reasonably expended on the litigation. *Hensley*, 424 U.S. at 435, 103 S.Ct. at 1940.

It is no small matter to "take on city hall," especially when one is a city employee or pensioner. The plaintiffs had to fight and scratch for every inch of ground they gained in this case. The defendants are represented by capable, highly competent counsel and almost every issue capable of being

contested was contested. The defendants moved for a severance and separate trials, there were two motions to dismiss, there was a motion to disqualify Ms. Sobieski and stay the proceedings, there was an unsuccessful interlocutory appeal, there was a petition for rehearing, there was a petition for certiorari, a motion to grant an interlocutory appeal on the statute of limitations issue, and a complicated jury trial over eleven trial days.

The Supreme Court in *Hensley* adopted the twelve-factor test set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

> These factors are: (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (1) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson*, 488 F.2d at 717-19.

Reed v. Rhodes, 179 F.3d 453, 471 n.3 (6th Cir. 1999).

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Plaintiffs were represented by Sobieski, Messer and Associates in this litigation. It is a small firm and presently consists of three lawyers. Ms. Sobieski is an experienced civil rights attorney. The court in *Hudson v. Reno* recognized that she has an extensive background in civil rights litigation. 130 F.3d at 1208. *See* Affidavits of Wanda G. Sobieski and Diane M. Messer, Exhibit 8 to Doc. 362. Five associates and several law clerks have worked on this case since its inception in October, 1966. Undoubtedly, this case has precluded the law firm from taking some other cases. Many of the material witnesses in this case were under defendants' control and this necessitated difficult investigation and many depositions. The case is "undesirable" from the viewpoint that Mayor Ashe is a popular mayor who has been elected and re-elected by the citizens of Knoxville for four terms since he first ran in 1988. The plaintiffs and their attorneys assumed a considerable financial risk in seeing this case through to conclusion.

I find that the hourly rates claimed for Ms. Sobieski, her associates and law clerks are reasonable and customary for the Knoxville, Tennessee, area. *See* Affidavits of Wanda G. Sobieski, Diane M. Messer, Dean Hill Rivkin, Carol S. Nickle, and David Burkhalter II, Exhibits 8 and 9 to Doc. 362.

The defendants contend that any amount of attorneys' fees and costs and expenses ultimately awarded the plaintiffs should be reduced by one-fifth to reflect the fact that William McGinnis recovered only nominal damages of $1.00 and will not benefit from any grant of injunction relief since he is retired. Although a party who receives nominal damages may

be prevented from recovering his attorneys' fees, *see Farrar v. Hobby*, 506 U.S. at 115, 113 S.Ct. at 575, Mr. McGinnis was successful in obtaining injunctive relief which protects not only his interests but that of similarly situated employees. The Supreme Court has rejected a mathematical approach which would compare the total number of issues in the case with those actually prevailed upon. *Hensley v. Eckerhart*, 461 U.S. at 435 n.11. "For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice-versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Id.* Mr. McGinnis, like the other plaintiffs, proved that two of the defendants were guilty of violating his constitutional rights and he obtained injunctive relief. He is a pensioner from the City of Knoxville and therefore his retired status does not completely divorce him from concerns of future retaliation. The damages will not be reduced by one-fifth as requested by the defendants.

The defendants argue that plaintiffs' counsel have taken the position all along that liability in this case was clear. The defendants argue that Ms. Sobieski holds herself out as an expert in the field of civil rights litigation and defendants therefore question why her partner, her associates and her law clerks have performed many hours of unspecified "research" for which they now seek to charge the defendants tens of thousands of dollars. They also question why it was necessary to redepose all three of the defendants over six days and take 19 additional depositions. The defendants answer their own question by stating that the purpose was to run up attorneys' fees in this case.

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Attached as Appendix A is a listing of challenged items which were specifically set forth by the defendants. The undersigned has considered the challenges and the plaintiffs' response thereto and finds for the reasons stated in the appendix that a deduction from the total attorneys' fees in the amount of $37,728 is called for.

The award of attorneys' fees will also be reduced significantly to account for the limited success obtained by the plaintiffs. This is an "equitable adjustment" which may be made by reducing the award to account for plaintiffs' limited success. *Hensley*, 424 U.S. at 436-37, 103 S.Ct. at 1941.

A summary of the plaintiffs' success or lack of success on claims made in this case follows:

The following claims were submitted to the jury or the court:

Plaintiff Gary G. Sharpe

1. denial of promotion to fire officer in 1996;
2. denial of merit pay for 1995 or 1996;
3. retaliation for filing the lawsuit;
4. compensatory damages;
5. punitive damages;
6. injunctive relief; and
7. prejudgment interest.

Mr. Sharpe prevailed on nos. 3, 4 and 6 only and received $2500.00 in compensatory damages.

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Plaintiff William G. Potter

1. 1995 transfer;
2. denial of merit pay for 1995 or 1996;
3. other adverse employment actions;
4. retaliation for filing the lawsuit;
5. compensatory damages;
6. punitive damages;
7. injunctive relief;
8. prejudgment interest; and
9. the FLSA claim.

Mr. Potter prevailed on nos. 4, 5 and 7 and was awarded $6500.00 in compensatory damages.

Plaintiff Kenneth F. Scarbrough

1. 1995 transfer;
2. denial of merit pay for 1995 or 1996;
3. retaliation for filing the lawsuit;
4. compensatory damages;
5. punitive damages;
6. injunctive relief; and
7. prejudgment interest.

Mr. Scarbrough prevailed on nos. 2, 3, 4 and 6 and was awarded $3250.00 in compensatory damages.

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Plaintiff Frank E. Potter

1. 1995 transfer;
2. denial of merit pay for 1995 or 1996;
3. retaliation for filing the lawsuit;
4. compensatory damages;
5. punitive damages;
6. injunctive relief; and
7. prejudgment interest.

Mr. Potter prevailed on nos. 2, 3, 4 and 6 and was awarded $3750.00 in compensatory damages.

Plaintiff William McGinnis

1. 1995 transfer;
2. denial of merit pay for 1995 or 1996;
3. retaliation for filing the lawsuit;
4. compensatory damages;
5. punitive damages;
6. injunctive relief; and
7. prejudgment interest.

Mr. McGinnis prevailed on nos. 2, 3 and 6 and was awarded $1.00 in nominal damages.

I have not adjusted the lodestar (the number of hours reasonably expended on the litigation times a reasonable hourly rate) by some type of mathematical comparison of the total number of issues in the case with those actually prevailed upon. That would be error. *Phelan v. Bell*, 8 F.3d 369, 374 (6th Cir. 1993). Rather, the summary of issues set

out above is useful in focusing on the appropriate inquiry in a case like this one which has in general, commonality of facts and legal theories, *i.e.*, the significance of the overall relief obtained by the plaintiffs in relation to the hours reasonably expended in this case. *Id.*

An injunction is actual relief on the merits which materially alters the legal relationships between the parties in a way that directly benefits the plaintiffs. *Granzeier v. Middleton*, 173 F.3d 568, 577 (6th Cir. 1999). The fact that plaintiffs were successful in obtaining injunctive relief certainly adds to the plaintiffs' level of success. The value of the rights vindicated goes beyond the actual award of compensatory damages. *McHenry*, 896 F.2d at 189. Nonetheless, where a plaintiff achieves only partial success "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Hensley*, 461 U.S. at 436, 103 S.Ct. at 1941. *See, e.g.*, *Granzeier*, 173 F.3d at 578 (Approving an attorney's fee of only 33% of the lodestar where the plaintiffs achieved only limited injunctive relief).

In this case, the award will be reduced by 20% in order to take into account the limited success achieved.

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G. *Summary*

For the reasons indicated, the plaintiffs will be awarded their attorneys' fees as follows:

The total fees and costs requested (giving plaintiffs credit for discrete tasks only in connection with the administrative proceedings) is $357,775.20. Exhibit 10 to Doc. 362. From that will be deducted $37,728.00 for the reasons indicated separately on Appendix 2. That totals $320,047.20. From that amount will be deducted $2632.10 representing the fees and costs which are claimed in connection with the Chancery suit. From that amount ($317,415.10) will be deducted 10% of that total for duplication of effort. This is to take into account the number of separate attorneys that participated in preparation and trial of this case, the fact that several associates entered and left the case during the proceedings, and to take into account the fact that there was duplication of effort in that the plaintiffs repeated discovery that was done in connection with the grievance proceedings before the Civil Service Board. Reduction by 10% results in a figure of $285,673.59. From this figure will be deducted 20% of the total or $57,134.72 to take into account the fact that the plaintiffs did not achieve all of the goals of their lawsuit. This results in a total award of attorneys' fees and related expenses of $228,538.87, plus $2000.00 in attorneys' fees pursuant to the supplement filed September 12, 2000 [Doc. 375].[5] This results in a total award of $230,538.87.

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5. I have reduced the September 4, 2000, entry because the office conference between plaintiffs' attorneys is not compensable.

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III. *Plaintiffs' Motion to Strike the Affidavit of Robert L. Crossley*

The plaintiffs move to strike Mr. Crossley's affidavit as being untimely filed and as containing impertinent and irrelevant information subject to being stricken pursuant to Fed. R. Civ. P. 12(f).

I cannot conceive that the plaintiffs have been prejudiced in any way by the late filing of the affidavit and it will not be struck on that ground.

The plaintiffs contend that the contents of the affidavit are impertinent and irrelevant in that the bulk of it merely recites language apparently drafted by defense counsel and does not establish any personal knowledge of this litigation, the fee application, or the actual work performed. The plaintiffs point out that Mr. Crossley does not suggest that he has reviewed the bills for which he offers his opinion or any portion of the pleadings to determine the nature or quality of the work encompassed within the fee request. The plaintiffs also contend that Mr. Crossley is biased in favor of the defendants and plaintiffs especially object to paragraph 5 of the affidavit. That paragraph criticized Ms. Sobieski's billing judgment while she was an equity partner at the law firm of Baker, Worthington, Crossley, Stansberry & Woolf. This brought a firm rejoinder from Ms. Sobieski and an affidavit which is Exhibit A to Doc. 372.

Motions to strike pursuant to Rule 12(f) address themselves to pleadings. An affidavit is not a pleading. Fed. R. Civ. P. 7(a). Thus, the affidavit shall not be struck pursuant to Rule 12(f).

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The plaintiffs' objections to the affidavit raise questions about the weight to be given to its content but do not provide grounds for striking it. The motion to strike will therefore be **DENIED.**

IV. *COSTS*

Taxation of statutory discretionary costs is governed by 28 U.S.C. § 1920 which provides as follows:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

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A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

Costs will be taxed against the City of Knoxville, Mayor Ashe, and Mr. Cureton. They are not taxed against Mr. Pressley as he prevailed on all issues.

The plaintiffs seek $120.00 in filing fees. This is not contested.[6]

The plaintiffs seek court reporter fees for 19 depositions in the amount of $10,522.55 [Doc. 358]. The defendant objects to the August 7 and August 8, 1996, depositions taken of Mayor Ashe, Bruce Cureton, Jack Vandergriff, and Robert Pressley. The objection is that the depositions were taken before the lawsuit was filed. That is true, but the court has determined in Part II.B., above, that certain discrete tasks were accomplished by counsel for the plaintiffs before the lawsuit was filed that are compensable as costs. These depositions fall into that category but to account for duplication of effort, I will reduce the total claim for costs in connection with depositions nos. 1, 2, 5-8 by 25%. The total claim for these depositions was $4636.85. Accordingly, the plaintiffs' claim for court reporter fees will be reduced by $1159.21 for a total award of $9363.34.

Even though Mr. Pressley was not found liable, the taking of his deposition was certainly reasonable and necessary for preparation of the plaintiffs' civil rights case. Counsel for

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6. *See* Amended Itemization of Costs filed August 8, 2000 [Doc. 361].

the plaintiffs signed the following declaration in support of plaintiffs' claim for costs:

> I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill was mailed today with postage prepaid to:
>
> The Court and Defendants' Attorneys

The defendants also object that plaintiffs are seeking $1035.61 in printing costs in connection with the plaintiffs' response to defendants' petition for certiorari. The plaintiffs responded that defendants included this item in their earlier bill of costs and claimed $2145.60 for it. The defendants' contention lacks merit. *See* 28 U.S.C. § 1920(4).

For the reasons indicated, statutory, discretionary costs are awarded to the plaintiffs and against the City of Knoxville, Mayor Ashe, and Mr. Cureton as follows:

Filing fee	$ 120.00
Court Reporters' Fees	9,363.34
Printing	1,035.61
Witness Fees	230.00
Total	$10,748.95

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V. *SUMMARY*

For the reasons indicated, an order will enter denying the plaintiffs' motion to reconsider the July 26, 2000, Memorandum Opinion, granting the plaintiffs' motion for attorneys' fees and related expenses pursuant to 42 U.S.C. § 1988(b) in the amount of $230,538.87, denying plaintiffs' motion to strike the affidavit of Robert L. Crossley, and fixing costs against the City of Knoxville, Mayor Ashe and Mr. Cureton at $10,748.95.

Order accordingly,

FILE:

s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-916
(MURRIAN)

GARY G. SHARPE, et al.,

Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, et al.,

Defendants.

ORDER

For the reasons stated in a Memorandum Opinion this day passed to the Clerk, it is **ORDERED** that defendants' motion to reconsider the July 26, 2000, Memorandum Opinion be **DENIED**; that plaintiffs' motion for attorneys' fees and related expenses pursuant to 42 U.S.C. § 1988(b) be **GRANTED**, and such fees and expenses are fixed at $230,538.87; that plaintiffs' motion to strike the affidavit of Robert L. Crossley be **DENIED**; that statutory costs be fixed at $10,748.95; and that the attorneys' fees, related expenses and statutory costs be hereby awarded in favor of plaintiffs and against the City of Knoxville, Mayor Ashe and Mr. Cureton [Docs. 358, 362, 371, 372].

Appendix B

ENTER:

s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

Appendix B

Challenged Item	Defendants' Objection Overruled	Defendants' Objection Sustained in Whole or in Part	Reason	Amount Deducted
Jan. 5, 1996 Invoice Re: Research	X		This was not one of the discrete tasks claimed by the plaintiffs	N/A
April 2, 1996 Invoice Re: "spreadsheets re: bonus pay"	X		Variety of spreadsheets prepared; extensive record review; information used at trial	0
August 5, 1996 "Research Documents" 1.9 hours		X	Plaintiffs have not demonstrated how this was reasonable	1.9 hrs at $140/hr = $266.00
FLSA Claim Before Complaint Filed		X	The plaintiff, William Potter, was not successful on this claim	$1122.00
April 3, 1997 Invoice (This exhibit was not found in Exhibit 4 to Doc. 320) re: deposition summaries		X	Excessive at this stage of the lawsuit.	13 hours at $35/hr = $455.00
May 5, 1997 Invoice - re: exhaustion of remedies, office conferences		X	No explanation by plaintiffs why exhaustion of remedies research was necessary. Conference time was not claimed.	11 hours at $35/hr = $385.00

APPENDIX A

Appendix B

June 4, 1997 Invoice re: review of summary judgment motion		X	Law Clerks review of defendants' motion for summary judgment for 20-25 hours is excessive	12 hours at $35/hr = $420.00
July 7, 1997 Invoice re: 35+ hours for law clerk review of cases, etc.		X	Excessive	20 hours at $35/hr = $700.00
November 4, 1997 Invoice re: 2 attorneys at hearing, etc.	X		Reasonable	0
January 7, 1998 Invoice re: research	X		Reasonable	0
February 5, 1998 Invoice re: "review cases" and Westlaw		X	Excessive	3 hours at $150/hr = $450.00
May 5, 1998 Invoice re: associate and law clerk research		X	Excessive	5 hours at $110/hr and 4 hours at $50/hr = $750.00
October 2, 1998 Invoice re: research and travel time		X	Research of Sixth Circuit panel unexplained. Travel time compensated at $75/hr	7.2 hours at $150/hr = $1080.00
July 15, 1999 Invoice re: duplication		X	Duplication of effort- four attorneys working on response to certiorari brief	(A reduction for duplication is made elsewhere)

December 8, 1998 Invoice re: duplication		X	New associate review file for 10 hours at $110/hr, other duplication	(A reduction for duplication is made elsewhere)
January 10, 2000 Invoice Re: preparation for mediation		X	14 hours at $150/hr for one attorney to prepare for mediation is excessive	4 hours at $150/hr = $600.00
March 28, 2000 Invoice Re: New associate		X	Trial preparation for new associate who did not participate in the trial.	15 hours at $100/hr = $1500.00
Post-Verdict Request		X	The FLSA claim was a discrete claim which was unsuccessful. A paying client would reasonably expect to pay for the other work.	$5,000.00
Attorneys' Fees for Fee Application		X	No reasonable paying client would pay over $38,000 in attorneys' fees for preparation of his own bill.	$25,000.00
			TOTAL DEDUCTIONS:	$37,728.00

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE FILED JULY 26, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-916
(MURRIAN)

GARY G. SHARPE, et al,

Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, et al,

Defendants.

MEMORANDUM OPINION

The plaintiffs' second motion to alter or amend judgment is before the undersigned [Doc. 345]. The defendants have responded [Doc. 348]. The plaintiffs filed a reply [Doc. 349]. Oral arguments were conducted on June 29, 2000.

Pursuant to Fed. R. Civ. P. 59(e), the defendant moves to alter or amend the Order filed in this case *nunc pro tunc* to May 8, 2000 [Doc. 354]. The plaintiffs seek relief from the undersigned's rulings in that Order pertaining to (1) the statute of limitations as it pertains to four of the plaintiffs'

transfers in September, 1995, (2) the need for injunctive relief, (3) William Potter's Fair Labor Standards Act claim, (4) prejudgment interest, and (5) the taxing of costs.

I. *Procedural Issue*

In their response, the defendants raise a procedural question that will be addressed first. The defendants argue that the court's Memorandum Opinion filed April 25, 2000, resolved all of the remaining issues in this litigation between the parties with the exception of costs and therefore it constituted a final order. As such, the defendants argue that any motion to alter or amend the judgment had to be filed within 10 days of that final order.[1] Defendants contend that the instant Rule 59(e) motion can only be considered under Fed. R. Civ. P. 60(b).[2]

---

1. Rule 59(e) provides as follows:

> **Motion to Alter or Amend Judgment.** Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

2. Rule 60(b) provides, in pertinent part, as follows:

> **Mistakes; Inadvertence; Excusable Neglect: Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial

(Cont'd)

Appendix C

The final paragraph of the Memorandum Opinion filed April 25, 2000, provided as follows:

> A hearing in connection with defendants' motion to tax costs pursuant to Fed. R. Civ. P. 68 and 28 U.S.C. § 1920 is hereby scheduled to commence at **1:30 p.m. on Tuesday, May 16, 2000.** Entry of a final order will await a determination of how costs should be assessed.[3]

(Cont'd)

> under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

3. Although entry of judgment and taxation of costs are entirely separate legal acts, Rule 58 permits, but does not require, the court to delay finality of judgment until an attorney fee dispute is decided. Wright, Miller & Kane, *Federal Practice and Procedure*: *Civil 2d* § 2781 at 13 (1995). There was an issue of attorneys' fees under 42 U.S.C. § 1988 to be decided when the Memorandum Opinion was filed.

Appendix C

File:
/s/
Robert P. Murrian
United States Magistrate Judge

[Doc. 334 at 36].

At the plaintiffs' request, the undersigned intended to enter a final order thirteen days later on May 8, 2000 [Doc. 40]. That order recited that "[f]or the reasons stated in the Memorandum Opinion passed to the Clerk on April 25, 2000, it is **ORDERED**. . . ." [Doc. 40 at 3]

Due to a clerical error, a separate judgment was not entered thereon as required by Fed. R. Civ. P. 58. When the error was discovered, the Clerk was ordered to enter judgment *nunc pro tunc* to May 8, 2000 [Doc. 350]. That was done pursuant to Fed. R. Civ. P. 60(a).[4] *See* Second Amended Judgment [Doc. 354].

The Memorandum Opinion filed April 25, 2000, did not meet the procedural requirements of a final, appealable order.

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4. This Rule provides:

> **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Aside from the fact that it expressly so stated, after the 1963 amendment to Rule 58 "[i]t no longer is possible . . . for an opinion to have the effect of a judgment. Instead there must be a separate document on which the judgment is set forth." Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2785 at 18 (1995), *citing United States v. Indrelunas*, 411 U.S. 216, 93 S.Ct. 1562 (1973); *see also United States v. Woods*, 885 F.2d 352, 353 (6th Cir. 1989).

Accordingly, the final order and judgment was entered in this case *nunc pro tunc* to May 8, 2000, and plaintiffs have filed a timely motion to alter or amend which will be considered on its merits.

II. *Statute of Limitations*

The undersigned dealt with this at length in the Memorandum Opinion filed April 25, 2000 [Doc. 334]. The Sixth Circuit recently discussed the statute of limitations in 42 U.S.C. § 1983 actions tried in Tennessee's federal courts.

> Hughes does not dispute the magistrate judge's use of Tennessee's one-year statute of limitations as the controlling statute. Indeed, "[i]n all actions brought under § 1983 alleging a violation of civil rights or personal injuries, the state statute of limitations governing actions for personal injuries is to be applied." *Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986). Following this rule, the applicable limitations period in Tennessee is one year. *See* Tenn. Code Ann. § 28-3-104(a)(1).

Appendix C

> The real dispute between the parties concerns when the one year began to run. Both sides refer to *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487 (Tenn. 1975), as setting forth Tennessee's rule on that issue. Federal law, however, controls the determination of when a civil rights action accrues. *See Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984). In *Sevier*, this court concluded as follows: "The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Id.* at 273 (citations omitted). This court has also stated that "[i]n determining when the cause of action accrues in section 1983 actions, we have looked to what event should have alerted the typical lay person to protect his or her rights." *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991).

Hughes v. Vanderbilt University, __ F.3d __, 2000 WL 726477 *4, No. 99-5499 (6th Cir., decided and filed June 7, 2000), slip op. at 8.

I remain convinced that the September 1995 transfers had that degree of permanence which should have (and, in fact, did trigger plaintiffs' awareness) triggered a typical lay person's awareness of and duty to assert his or her rights. These transfers therefore started the one-year statute of limitations running and suit was not filed until thirteen

months later. *Anderson v. City of Bristol, Tennessee*, 6 F.3d 1168, 1175 (6th Cir. 1993) ("[T]he key is whether the original discriminatory act had the degree of permanence that should trigger an employee's awareness of and duty to assert his or her rights." (internal quotations and citations omitted)); *Huckaby v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998) ("The core idea of the continuing violations theory . . . is that equitable considerations may very well require that the filing periods not begin to run until facts are supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights"); *Sabree v. United Brotherhood of Carpenters and Joiners*, 921 F.2d 396, 401-02 (1st Cir. 1990) (There must be a substantial relationship between a timely claim and untimely claims to constitute a continuing violation and where the untimely claims put the plaintiff on inquiry notice, there is no such substantial relationship).

The defendants' failure to re-transfer the plaintiffs to their original locations for about eleven months was not a discriminatory act or continuing violation of plaintiffs' rights; rather, the plaintiffs' status during this period of time was simply the result of discrete acts—the 1995 transfers. *United Airlines v. Evans*, 431 U.S. 553, 557-58; 97 S.Ct. 1885, 1888-89 (1977); *Sabree*, 921 F.2d at 400.

"Repeated requests for further relief from a prior act of discrimination will not set the time limitations running anew." *EEOC v. McCall Printing Corp.*, 633 F.2d 1232,

1237 (6th Cir. 1980). Residual effects of prior acts of discrimination do not constitute continuing violations of one's rights. *Id.*

Where there are discrete, specific acts of alleged discrimination (like the September, 1995 transfers) which are not substantially related to any later acts of discrimination, the continuing violation doctrine does not apply. The *Sabree* case correctly defines how one determines the relatedness or unrelatedness of acts occurring outside the statute of limitations period to those occurring within. 921 F.2d at 401-02. The degree of permanence of the untimely action is the single most important factor. *Id.* Likewise, the Sixth Circuit considers the degree of permanence "key" in deciding whether an act of discrimination should be considered as a part of a continuing violation or a separate act that starts the statute of limitations running. *Anderson v. City of Bristol, Tennessee*, 6 F.3d at 1175. Even where there is proof of events over a period of years that could be construed as a longstanding policy of discrimination, **unrelated** incidents of discrimination will not suffice to invoke the exception to the normal rule that statutes of limitations accrue when the discriminatory act occurred. *Haithcock v. Frank*, 958 F.2d 671, 678 (6th Cir. 1992). For purposes of plaintiffs' continuing violation theory in this case, the September, 1995 transfers were, as a matter of law, unrelated to the subsequent acts of discrimination against the plaintiffs under the teachings of *Sabree* and *Anderson v. City of Bristol, Tennessee.*

In the instant case, the September, 1995 transfers had such permanence (*i.e.*, what the plaintiffs knew or should have known at the time of the transfers) that, as a matter of

law, the one-year statute of limitations began running against them. The jury's award of damages for the September, 1995 transfers therefore cannot stand.

Plaintiffs place particular emphasis on the case of *Bell v. Chesapeake and Ohio Railway Co.*, 929 F.2d 220 (6th Cir. 1991).[5] In particular, they point to the following language:

> Hence, application of the third element of the continuing violation doctrine [permanency] requires the court to determine when the plaintiff discovered he was a victim of the continuing policy or pattern of discrimination. Acts occurring before that date and outside the statute of limitations are barred as the basis for any cause of action, **unless the plaintiff can demonstrate that they are the results of a policy and at least one act occurred within the limitations period.**

929 F.2d at 224 (emphasis added). The plaintiffs point to the testimony of Patrick Cummins as an example of how Mayor Ashe has had a longstanding policy of retaliation against his political opponents. Cummins was an Ashe supporter when he first ran for Mayor in 1988. He testified at trial that after Ashe was elected, Ashe personally scratched the names of his political opponents off the firefighter eligibility list for promotions. He also testified that some promotions of

5. Bell represents the legal standard under Michigan law for continuing violations and its application to this federal civil rights case is questionable at best. *Gibb v. Kemp*, 999 F.3d 539 (6th Cir. 1993) (table); 1993 WL 265161 **3. The court cites *Haithcock v. Frank*, *supra*, as stating the correct legal standard.

firefighters were meted out by Ashe in 1988 based on who had supported him in the election and not merit. Cummins testified that Mayor Ashe had a remarkable memory for those who had supported him. Cummins also related how he believed that he had been demoted and otherwise discriminated against after he supported Ashe's opponents in the 1992 and 1996 mayoral elections.

There was this evidence and other evidence in the record which, if believed, support a jury finding that there was an over-arching policy of retaliation against the mayor's political opponents. At this point in the case, it must be assumed that the jury so found. The jury also found that two of the plaintiffs (Ken Scarbrough and Frank Potter) were denied merit pay or bonuses for the years 1995 or 1996. These violations of the plaintiffs' rights would have occurred in approximately December, 1995 and December, 1996. Viewing the evidence in a light most favorably to plaintiffs, as must be done at this time, I will assume the jury found that the plaintiffs were denied merit or bonus pay in December, 1995—that would have been a violation of plaintiffs' civil rights within the one year preceding the filing of this suit in October, 1996.

Even assuming these predicate facts, I do not find that the language cited and relied upon by plaintiffs in *Bell v. Chesapeake and Ohio Railway* applies here. That case was brought seeking relief for alleged racial discrimination in the workplace under Michigan's civil rights in employment law. The court held that the plaintiff had "failed to state a cause of action under the continuing violation theory." 929 F.2d at 222. The court noted that the incidents of alleged racial hostility toward him "were isolated occurrences over

a nine-year period." *Id.* at 225. The court found that plaintiff had not demonstrated some type of policy of encouraging or indifference toward racial hostility on the defendant's part, that the acts complained of were spread over nine years and were too infrequent to be labeled a "continuing course of conduct" and that each of the acts "**should have made [defendant] aware he had suffered injury, thereby imposing on him the duty to bring this action within the limitations period.**" *Id.* (emphasis added).

Thus, the court found three separate reasons that the continuing violation theory did not save plaintiffs' claim.

The court relied on the case of *Berry v. Board of Supervisors of Louisiana State University*, 715 F.2d 971 (5th Cir. 1983) in discussing the "permanence rule" which I have relied on in this case, and the court described the holding in *Berry* as follows:

> The case involved a female university professor who had a heavier workload than her male counterparts. She was permitted to sue on the basis of actions that occurred outside the limitations period because it was not obvious that she was the victim of a discriminatory policy until she had been on the payroll for a few years with a heavy course load while those of her male counterparts were lighter. **In other words, the worker did not—and could not—become aware of the need to take legal action to vindicate her rights until a period of time had elapsed.**

929 F.2d at 224 (emphasis added). The language relied upon by plaintiffs, and quoted above, immediately follows this quote from the opinion.

The "permanence element" of the continuing violation theory requires a court to differentiate between "(1) the continuing effects of past discrimination that is no longer actionable because of the statute of limitations, and (2) a discriminatory act that was part of a pattern and which brings to the attention of the victim the fact of the continuing violation." *Id.* at 223. The court noted that the **most important reason** for granting a plaintiff relief under the continuing violation theory "is that many discriminatory acts occur in such a manner that it is difficult to define precisely when they took place. . . . One might say they unfold rather than occur." *Id.* That is certainly not the situation in this case. These four plaintiffs had no difficulty in concluding that their civil rights had been violated as soon as the transfers occurred.

The instant case does not involve plaintiffs who did not—and could not—become aware of the need to protect their rights until a period of time had passed. *See id.* at 224. These four plaintiffs believed immediately in September, 1995 that their constitutional rights had been violated by the transfers. Reasonable minds simply could not differ about that. "The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights." *Huckaby v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998); *see also Anderson v. City of Bristol, Tennessee,* 6 F.3d 1168, 1175 (6th Cir. 1993). These transfers were discrete acts of

discrimination which, under the facts of this case and as a matter of law, started the one-year statute of limitations running.

The plaintiffs' motion to alter or amend the judgment with respect to the running of the statute of limitations will be denied.

III. *Injunctive Relief*

Plaintiffs move to alter or amend the judgment and underlying findings of fact and conclusions of law regarding injunctive relief contained in the Memorandum Opinion filed April 25, 2000.

The plaintiffs argue strenuously that the court has failed to recognize that there is a clear threat that irreparable injury will occur to them if this relief is not granted and that no other adequate remedy is available. *See City of Parma v. Levi*, 536 F.2d 133, 135 (6th Cir. 1976). The plaintiffs argue that without an injunction there is no deterrent in place that will avoid continuation of Mayor Ashe's unconstitutional actions, that money damages alone do not suffice to repair the injury caused by the mayor's unconstitutional actions, that none of the existing legal remedies deterred the mayor from pursuing his pervasive and persistent policy of punishing public employees who exercise their First Amendment rights to freedom of political affiliation or to seek redress in the courts, that the mayor has refused to admit the unconstitutionality of his actions, that there is no assurance that the mayor will not retaliate against plaintiffs and others in the nearly four years remaining in his term, that retaliation for filing this

lawsuit would not be grievable before the Civil Service Merit Board, that the court erred in considering the fact that no punitive damages were awarded and that only an injunction can protect the interests at stake.

I am persuaded that the plaintiffs are right and that the judgment should be altered and amended to include injunctive relief. After further briefing and arguments by counsel and after further reflection and study by the undersigned, the undersigned is convinced that the judgment should be amended to grant such relief.

The First Amendment rights at issue here (political belief and association, access to the courts without fear of retaliation) are at "the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356, 96 S.Ct. 2673, 2681 (1976). "Patronage . . . to the extent it compels or restrains belief and association is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment." *Id.*, 427 U.S. at 357, 96 S.Ct. at 2682 (internal quotation omitted).

One recurring and disturbing position espoused by the defendants throughout this litigation has been that involuntary transfers and the denial of merit pay and bonuses cannot be First Amendment violations because such actions are merely private personnel grievances and not matters of public concern. *See* Memorandum Opinion filed November 13, 1997, at 14 [Doc. 164]. When this case was appealed to the Sixth Circuit, the issue presented was "whether, as of 1995, it was clearly established that retaliatory personnel

actions of the type complained of here were sufficiently 'adverse' to be actionable." *Sharpe v. Cureton*, 172 F.3d 873, 1999 WL 55274 (6th Cir. January 13, 1999) (table). The court answered with a clear "yes."

> The defendants argue that they are entitled to qualified immunity, notwithstanding any violation of the plaintiffs' First Amendment rights, "because reasonable officials in defendants' respective positions could have believed their actions lawful under the specific facts and circumstances known to them." We disagree.
>
> The "specific facts and circumstances" known to the defendants, *ex hypothesi,* included knowledge that the transfers and other adverse employment actions of which the plaintiffs complain were retaliatory in nature. Yet as early as 1982, the Seventh Circuit's *Rutan* panel noted, it had been held that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee could be actionable when intended to punish her for exercising her free speech rights." *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954 n.4 (7th Cir. 1989), *citing Bart v. Telford,* 677 F.2d 622 (7th Cir. 1982). *Rutan* itself was not a retaliation case, of course, but the Supreme Court's *Rutan* [*v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729 (1990)] opinion gave this endorsement to the Seventh Circuit's dictum on retaliation: "[T]he First Amendment, as the court below noted, already protects state employees not

> only from patronage dismissals but also from 'even an act of *retaliation* as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.'" *Rutan*, 497 U.S. 62, 75 n.8 (emphasis supplied).
>
> The Supreme Court's opinion in *Rutan* had been in the public domain for five years by the time of the acts complained of here, while our court's opinion in *Bloch*, 156 F.3d 673 [6th Cir. 1998]—an opinion in which we adopted the "person of ordinary firmness" test—was still three years in the future. The defendants have never given a satisfactory answer to the question of how a reasonable official could read the Supreme Court's opinion in *Rutan*, including footnote 8, and still consider it constitutional to punish the plaintiffs in the manner the plaintiffs claim to have been punished for exercising their free speech rights.

Id. at **2-3.

The jury did not award the plaintiffs a substantial amount of damages, but this is not uncommon in civil rights actions such as this one. The jury did find that all five plaintiffs suffered retaliation as a result of their filing of this lawsuit, that two of the plaintiffs were denied merit or bonus pay because they did not support Mayor Ashe in the 1995 election and found that three of the plaintiffs were transferred in September, 1995 because they failed to support the Mayor

in the election. The defendants refused to even consider plaintiffs for merit or bonus pay in 1996 because the plaintiffs had filed this lawsuit.

As I discussed in Part II of this opinion, there was evidence from which a reasonable jury could conclude that political retaliation against political enemies among firefighters by the mayor's office has gone on for some time. At this point in the case, that evidence must be viewed in a light most favorable to the plaintiffs. There has never been a clear, public acknowledgment of responsibility for violation of the plaintiffs' civil rights from either defendant adjudged responsible for doing so by the jury. Neither has there been an assurance to city employees that it will not happen again. Moreover, it needs to be emphasized in a most clear and effective way that the freedoms of political belief and political association are hard-won and precious freedoms which are not to be trifled with and that the federal courts are able to effectively deal with those who attempt to do so. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976).

It is likely that this is not the first city administration to engage in activities based on the political beliefs and political associations of city employees. Counsel for the defendants has made the argument several times that one of the plaintiffs was the beneficiary of political favoritism by a previous administration. Even if true, this does not excuse the violations of First Amendment rights which the jury found to have occurred in the instant case. It is time for such activities to cease.

For the reasons indicated, a permanent injunction will enter enjoining defendant Victor Ashe from discriminating against Knoxville firefighters on account of their political opinions and affiliations, past, present or future, provided, however, that the injunction shall not apply to policymaking and confidential employees of the city who do not enjoy civil service protection. *See Branti v. Finkel*, 445 U.S. 507, 517, 100 S.Ct. 1287, 1294 (1980).

IV. *Fair Labor Standards Act*

For the reasons stated in the Memorandum Opinion filed April 25, 2000, the motion to alter or amend the judgment regarding William Potter's Fair Labor Standards Act claim will be denied [Doc. 334].

V. *Prejudgment Interest*

For the reasons stated in the Memorandum Opinion filed April 25, 2000, the motion to alter or amend the judgment regarding an award of prejudgment interest to plaintiffs will be denied [Doc. 334].

VI. *Taxing of Costs*

On December 6, 1996, the defendants made their initial Rule 68 offers of judgment to the plaintiffs.[6] A second set

6. Fed. R. Civ. P. 68 provides as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or

(Cont'd)

was made on November 4, 1997. These offers of judgment have assumed a great deal of significance in this case because plaintiffs' attorneys' fees and other costs are substantial and the Rule 68 offers of judgment may or may not have shifted the burden of paying costs and may have extinguished defendants' responsibility to pay plaintiffs' attorneys' fees after the offers were made pursuant to 28 U.S.C. § 1988(b).[7] *See Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012 (1985).

(Cont'd)

> to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

7. This statute provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of

(Cont'd)

Appendix C

The plaintiffs argue that the offers of judgment were insufficiently definite to constitute valid offers.

Contract principles apply in determining whether or not a valid offer of judgment has been made, *e.g.* "[t]here must be a meeting of the minds." *Johnson v. University College of the University of Alabama in Birmingham*, 706 F.2d 1205, 1209 (11th Cir.), *cert. denied*, 104 S.Ct. 489 (1983). There must be a "clear understanding of the terms [of an offer of judgment] in order to have a valid acceptance of the offer." *Boorstein v. The City of New York*, 107 FRD 31, 33-34 (S.D. N.Y. 1985). For example, an offer to allow judgment against a defendant for "100,000 mcf [presumably, a million cubic feet] of gas" was too ambiguous to constitute a valid offer of judgment because the defendant did not specify the value of the gas and refused to clarify the offer. *Arkla Energy Resources, etc. v. Roye Realty and Developing, Inc.*, 9 F.3d 855, 867 (10th Cir. 1993).

"The defendant must show that the offer was more favorable than the judgment and that the mandatory cost-shifting provision was therefore triggered." *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1075-1076 (7th Cir. 1999).

> Defendants should bear this burden for two reasons. First, because Rule 68's cost-shifting

(Cont'd)

> this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

> provision is mandatory and applies to individual parties—the "offeree must pay the costs incurred" by the offeror . . .—plaintiffs face serious consequences in either accepting or rejecting a Rule 68 offer. . . . A judgment less favorable than the offer requires that a plaintiff pay the defendant's usually substantial post-offer costs. There must therefore be a clear baseline from which plaintiffs may evaluate the merits of their case relative to the value of the offer . . . . Second, courts also need easily comparable sums. In applying Rule 68, courts have "no discretion to alter or modify the parties' agreement." . . .

Id. at 1076 [citations omitted] [emphases omitted]. The central issues in the instant case regarding the offers of judgment are (1) were the plaintiffs given a "clear baseline" from which they could evaluate the merits of their case relative to the values of the offers and, (2) were the plaintiffs and the court provided with "easily comparable sums?" *Id.* The court must examine the terms of the offers when rejected and not with 20-20 hindsight. Where "a defendant is on notice that the plaintiff, with reason, interprets the offer differently, the defendant is not entitled to the benefits of Rule 68, unless he amends his offer to remove doubt as to its meaning." *Lish v. Harper's Magazine Foundation*, 148 F.R.D. 516, 519 (S.D. N.Y. 1993). The following offers of judgment were made in this case.

> RULE 68 OFFER OF JUDGMENT – WILLIAM POTTER
>
> The defendants in the above styled lawsuit do hereby appear and make this offer of judgment

pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer William G. Potter the following:

1. Potter shall retain his title of Administrative Deputy Chief of Firefighting;

2. Potter shall be paid his former administrative hourly rate of pay for any hours worked in excess of forty (40) hours per week, from and after February 1, 1996, on the hourly rate of:

> (a) $21.2544 per hour for the time period of February 1, 1996 through July 6, 1996; and
>
> (b) the hourly rate of $21.7670 per hour for the time period from and after July 7, 1996 to the date of the next annual pay adjustment provided however that actual overtime pay already received by Potter shall be credited to the pay calculated hereunder and shall be deducted from the accrued amount payable from February 1, 1996, through the date of this offer;

3. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

4. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

5. Payment for damages in the amount of One Thousand One and No/100 Dollars ($1,001.00).

FIRST RULE 68 OFFER OF JUDGMENT – GARY SHARPE

The Defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Gary G. Sharpe the following:

1. The promotion to the rank of *Fire Officer* effective from and after *February 4, 1996*;

2. Reimbursement for any loss in back pay calculated as follows: (a) two step merit increase effective January 7, 1996; (b) an additional two steps for the promotion to Fire Officer effective February 4, 1996; and (c) payment of any overtime deficiency in accrued overtime resulting from the increases in hourly rate of pay as calculated in (a) and (b).

3. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

4. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

5. Payment for damages in the amount of One Thousand One and No/100 Dollars ($1,001.00).

SECOND RULE 68 OFFER OF JUDGMENT – GARY SHARPE

The Defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Gary G. Sharpe the following:

1. The promotion to the rank of *Fire Officer* effective from and after *February 4, 1996*;

2. Reimbursement for any loss in back pay calculated as follows:

(a) two step merit increase effective January 7, 1996;

(b) an additional two steps for the promotion to Fire Officer effective February 4, 1996;

(c) an additional two step increase effective January 1997; and

(d) payment of any overtime deficiency in accrued overtime resulting from the increases in hourly rate of pay as calculated in (a), (b) and (c).

3. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

4. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

5. Payment of an additional amount of Seven Thousand, Five Hundred One and No/100 Dollars ($7,501.00).

RULE 68 OFFER OF JUDGMENT – FRANK POTTER

The defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Frank Potter the following:

1. A two step merit increase effective January 7, 1996;

2. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

3. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

4. Payment for damages in the amount of Five Hundred One and No/100 Dollars ($501.00).

SECOND RULE 68 OFFER OF JUDGMENT – FRANK POTTER

The defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Frank Potter the following:

1. A two step merit increase effective January 7, 1996 plus payment of any back pay associated with said two step increase;

2. A two step merit increase effective January 1997 plus payment of any back pay associated with said two step increase;

3. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

4. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

5. Payment for damages in the amount of Seven Thousand, Five Hundred One and No/100 Dollars ($7,501.00).

RULE 68 OFFER OF JUDGMENT – KENNETH SCARBROUGH

The defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Kenneth Scarbrough the following:

1. A two step merit increase effective January 7, 1996;

2. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

3. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

4. Payment for damages in the amount of Five Hundred One and No/100 Dollars ($501.00).

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SECOND RULE 68 OFFER OF JUDGMENT – KENNETH SCARBROUGH

The defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Kenneth Scarbrough the following:

1. A two step merit increase effective January 7, 1996 plus payment of any back pay associated with said two step increase;

2. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

3. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988;

4. A two step merit increase effective January 1997 plus payment of any back pay associated with said two step increase; and

5. Payment for damages in the amount of Seven Thousand, Five Hundred One and No/100 Dollars ($7,501.00).

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RULE 68 OFFER OF JUDGMENT – WILLIAM MCGINNIS

The defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer William H. McGinnis the following:

1. Cycle pay in the amount of One Hundred Forty-Five and 15/100 ($145.15);

2. A two step merit increase effective January 7, 1996;

3. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

4. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

5. Payment for damages in the amount of Five Hundred One and No/100 Dollars ($501.00).

SECOND RULE 68 OFFER OF JUDGMENT – WILLIAM MCGINNIS

The Defendants in the above styled lawsuit do hereby appear and make this offer of judgment

pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer William H. McGinnis the following:

1. Cycle pay in the amount of One Hundred Forty-Five and 15/00 Dollars ($145.15);

2. A two step merit increase effective January 7, 1996 plus payment of any back pay associated with said two step increase;

3. A two step merit increase effective January 1997 plus payment of any back pay associated with said two step increase;

4. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

5. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

6. Payment of an additional amount of Seven Thousand, Five Hundred One and No/100 Dollars ($7,501.00).

It was not until after trial that defendants placed actual dollar figures on the value of the offers to provide plaintiffs Sharpe, Frank Potter, Scarbrough, and McGinnis with merit pay increases. *See* Defendants' Motion to Tax Costs Pursuant

to Federal Rule of Civil Procedure 68 and 28 U.S.C. § 1920 [Doc. 306]. Thomas Patrick Armstrong, Fire Planning and Operations Manager for the City of Knoxville, calculated the value of the Rule 68 offers to plaintiffs, if they had accepted them, up to the pay period ending January 29, 2000. His affidavit is dated February 22, 2000. The figures contained in it were not provided to plaintiffs at the time the offers were made to the plaintiffs nor at any time until after trial.

It was not the plaintiffs' burden to figure out what the Rule 68 offers were worth when offered and for the ten days the plaintiffs had in which to consider the offers; rather, it was defendants' burden to put forth clearly defined terms upon which there could be a meeting of the minds. *Boorstein*, 107 F.R.D. at 33-34; *Johnson v. Penrod Drilling Co.*, 803 F.2d 867, 870 (5th Cir. 1986) ("Rule 68 is a mandatory rule designed to operate automatically by a comparison of two clearly defined figures."). Rule 68 "is a mandatory rule to be narrowly applied." 803 F.2d at 870.

Plaintiffs' counsel contacted one of the defendants' attorneys (Mr. Watson) by telephone on December 11, 1996, asking that the first offers be clarified. With regard to the second offers, plaintiffs' counsel, Ms. Sobieski, wrote to defendants' counsel requesting clarification [Exhibit 4 to Doc. 349]. No clarification was received in either instance and there was no "meeting of the minds" regarding the **meaning** of the Rule 68 offers. It is true that Rule 68 offers and acceptances are not like ordinary contract negotiations because in the latter situation the offeree is free to reject terms that he or she does not like with no adverse consequences.

In the Rule 68 situation, the offeree does so at his or her peril. The terms of the offer have to be sufficiently clear for the plaintiff to make an informed decision. If they are not, the offer is invalid.

Defendants argue that Ms. Sobieski's letter to defense counsel dated November 5, 1997, demonstrates that plaintiffs knew exactly what was being offered with the second offers of judgment. I cannot agree. First of all, the **offers** did not afford plaintiffs or the court with clearly defined figures against which the court can compare the judgment ultimately obtained. To be sure, the defendants have put a dollar value on the offers **after trial**, but the critical time is the ten days in which plaintiffs had to accept or reject the offer. Plaintiffs could have been provided with figures from Mr. Armstrong when the offers were made. For example, the plaintiffs could have been given an estimate of the value of a two-step merit pay increase to Frank Potter over his estimated working life from and after January 7, 1996. Plaintiffs could have hired an accountant to do that when the offer was made, but it was not plaintiffs obligation to do so; rather, it was up to the defendants to provide plaintiffs and this court with some reasonable value of the offers when made with which the final judgment can be compared. *Grosvenor v. Brienen*, 801 F.2d 944, 949 (7th Cir. 1986); 13 *Moore's Federal Practice* § 68.04 [6] (3d ed. 1998) (The effect of an offer must be judged by the terms of the offer as they existed at the time plaintiff rejected the offer). "[E]vidence dating from *after* acceptance or rejection of a Rule 68 offer is not relevant to the construction of its terms. . . ." *Moore's*, at 68-23.

Secondly, in her letter of November 5, 1997, Ms. Sobieski pointed out the uncertainty and ambiguity of defendants' offer of "an agreement by the defendants not to engage in any discriminatory practices in the future based on political affiliation." Plaintiffs sought a more specific, permanent injunction and argued that the

> counter-proposal [of defendants'] is unacceptably narrow, and I fear an argument in the future that "political affiliation" will be read unnecessarily restrictively, will not cover those who choose not to affiliate with either party, and that the city might hereafter take the position that they [sic] intended that language only to apply to adversary political parties.

From the outset of this litigation, the plaintiffs have considered injunctive relief to be an important part of the relief sought. They should not be penalized for refusing to accept what they considered to be a "watered down" and ambiguous offer to refrain from future violations of firefighters' First Amendment rights. This was an integral part of the defendants' offer. The plaintiffs' position was that without an injunction, their employment status would be subject to the vagaries that they had experienced in the past.

The defendants must have believed that their offer not to discriminate had some meaning and value or it would not have been included. The plaintiffs did not understand what it meant and communicated that to defendants. No clarification was received. The purpose of Rule 68 is to settle lawsuits. That purpose is frustrated where the offer is

too unclear to allow evaluation of it. *Boorstein*, 107 FRD at 34. The defendants could have clarified their Rule 68 offer not to discriminate by agreeing to an appropriately worded injunction, but they did not do so. As it was, plaintiffs had no reasonable basis to evaluate the worth of defendants' offer not to discriminate in the future.[8]

Chief William Potter received only one offer of judgment. He was offered his former administrative hourly rate for any hours in excess of forty at a rate of about $21 per hour. There was no specification of what his rate would be for the first forty hours per week. One might assume that it would be the approximate $15 per hour that the city had calculated as his new base rate. But, here again, it was up to defendant to spell that out in the offer or to clarify it if the plaintiff did not understand. The defendants did not do so. Plaintiffs contend that their counsel contacted defense counsel specifically about § 2(b) of the offer but received no clarification.

The undersigned is of the opinion that each of the offers of judgment must be construed based on all of the terms contained therein. In other words, for example, it would not be appropriate to just look at the $7501.00 in cash offered

8. The defendants did not have to offer equitable relief even though plaintiffs sought both equitable relief and damages. 13 *Moore's Federal Practice* § 68.04 [5](3d ed. 1998). The defendants did, however, include in their offers of judgment "an agreement . . . not to engage in any discriminatory practices in the future based upon political affiliation." Since this was included in the offers, it cannot be ignored by the court in deciding whether or not the terms of the Rule 68 offers were sufficiently clear.

Gary Sharpe in his second offer of judgment and make some determination of whether the judgment he obtained "beat" that figure. Rather, that offer of judgment and the others must be evaluated based on all proposed terms contained therein. "An offer that is invalid as to one term cannot be reformed by the court or partially accepted by a claimant." 13 *Moore's Federal Practice* § 68.04 [7] (3d ed. 1998). When so viewed, none of the offers of judgment provided plaintiffs with a clear baseline from which plaintiffs might have evaluated the merits of their case relative to the value of the offers. *Gavoni*, 164 F.3d at 1076. Because of the severe penalties imposed on plaintiffs under Rule 68, the defendants had the burden of tendering clear and concise offers, capable of comparison to the relief the plaintiffs expected to receive. *Id.*

The plaintiffs were under no obligation to move to strike the offers of judgment. *See Boorstein v. City of New York*, 107 FRD 31, 35 (S.D.N.Y. 1985) (motion to strike offer of judgment is procedurally permissible). Doing so would likely bring howls of protest from a defendant that plaintiffs were trying to prejudice the defendant by revealing that a settlement offer had been made. Furthermore, Rule 68 states that evidence of an offer not accepted is not admissible except in a proceeding to determine costs. *See generally,* 13 *Moore's Federal Practice* § 68.04 [2] (3d ed. 1998).

At all times, the burden was on defendants to propound offers of judgment that were clear, concise and capable of ready valuation by plaintiffs **at the time the offers were made** without resort to assumptions. The defendants' attempt to value the offers of judgment **at the time of the verdict** does not shed very much light on what the offers were worth

when made. The defendants could have refined their offers of proof in response to plaintiffs' inquiries but they did not do so. As a result, they are not binding on plaintiffs.

As prevailing parties, the plaintiffs are awarded their costs against the defendants.

VII. Summary

For the reasons indicated, the plaintiffs' motion will be denied with respect to the statute of limitations question, William Potter's Fair Labor Standards Act claim, and the court's refusal to award prejudgment interest.

The plaintiffs' motion to alter or amend judgment will be granted for the reasons indicated with respect to injunctive relief and the taxing of costs.

Order accordingly

FILE

s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-916
(MURRIAN)

GARY G. SHARPE, et al,

Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, et al,

Defendants.

ORDER

For the reasons stated in a Memorandum Opinion this day passed to the Clerk, it is

ORDERED AND ADJUDGED that the defendants' motion for judgment as a matter of law is **GRANTED** with respect to the 1995 transfer claims of William G. Potter, Kenneth F. Scarbrough, Frank E. Potter, and William H. McGinnis as is set out in the Memorandum Opinion entered on April 25, 2000, and the Memorandum Opinion filed herewith.

It is further **ORDERED AND ADJUDGED** that the plaintiffs' motion to alter or amend the second amended

judgment, is **GRANTED** in part and DENIED in part as follows. It is **ORDERED AND ADJUDGED** that judgment is entered in favor of the plaintiffs Gary G. Sharpe, William G. Potter, Kenneth Scarbrough, Frank Potter and William McGinnis, against defendants, Bruce Cureton and Victor Ashe, individually, and the City of Knoxville, but not as to defendant, Robert Pressley. Compensatory damages are awarded against defendants Bruce Cureton and Victor Ashe, individually, in the amount of $2,500.00 to plaintiff, Gary Sharpe; $6,500.00 to plaintiff, William G. Potter; and $1.00 to plaintiff William McGinnis. Compensatory damages in the amount of $3,250.00 are awarded to plaintiff, Kenneth Scarbrough, against defendant City of Knoxville and defendants, Bruce Cureton and Victor Ashe, individually. Compensatory damages in the amount of $3,750.00 are awarded to plaintiff Frank Potter against defendant City of Knoxville and defendants, Bruce Cureton and Victor Ashe, individually.

Judgment is entered in favor of defendant City of Knoxville in connection with plaintiff William Potter's Fair Labor Standards Act claim and plaintiff William Potter shall take nothing on that claim.

Plaintiffs' request for permanent injunction is **GRANTED.** Mayor Ashe is hereby enjoined from taking any adverse employment actions such as transfers, demotions, refusal to hire, refusal to promote, reduction of compensation or refusal to increase compensation of Knoxville Fire Department firefighters on account of their political beliefs and associations or their choice to remain neutral in political

matters. This injunction shall not apply, however, to any Knoxville Fire Department employees who are not covered by the city's civil service regulations.

Plaintiffs' request for front pay is **DENIED.** Plaintiffs' request for prejudgment interest is **DENIED.** Plaintiffs' motion to interview jurors is **DENIED.**

Plaintiffs are not awarded punitive damages.

Plaintiffs are awarded their costs as prevailing parties against the defendants and shall file their claim for costs within thirty (30) days of entry of this final judgment.

The Clerk shall enter this Order as the final judgment in this case.

IT IS SO ORDERED.

ENTER:

s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 10, 2003

Nos. 00-5805/6089/6361/6362

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY G. SHARPE, ET AL.,

Plaintiffs-Appellants/Cross-Appellees (00-5805/6089),
Plaintiffs-Appellees/Cross-Appellants (00-6361/6362),

v.

BRUCE CURETON, CHIEF IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES,

Defendants-Appellees/Cross-Appellants (00-5805/6089),
Defendants-Appellants/Cross-Appellees (00-6361/6362).

ROBERT PRESSLEY, DEPUTY FIRE CHIEF, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES,

Defendants-Appellees (00-5805), Defendant (00-6089),
Defendant/Cross-Appellee (00-6361/6362).

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and FORESTER,* District Judge.

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* Hon. Karl S. Forester, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

Appendix D

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX E — ORDER OF THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE ENTERED APRIL 7, 2003

IN THE CHANCERY COURT FOR
KNOX COUNTY, TENNESSEE

No. 153997-3

CITY OF KNOXVILLE

Petitioner,

vs.

ROBERT B. CRISP, CECIL RISDEN, NEAL R. MANEY, STEVEN FOWLER, and THE CIVIL SERVICE MERIT BOARD FOR THE CITY OF KNOXVILLE,

Respondents.

ORDER

This cause came to be heard on the 12th day of February, 2003 on the appeal of the City of Knoxville from the Findings of Fact and Conclusions of Law of a hearing officer of the Civil Service Merit Board for the City of Knoxville, dated January 14, 2002, as amended by Corrected Order entered January 18, 2002, (a copy of which is attached hereto as *Exhibit 1*).

Having considered the Record created by the Civil Service hearing, the stipulations entered into by counsel during this proceeding regarding certain findings made by

the hearing officer (a copy of which is attached hereto as *Exhibit 2*), and after hearing the arguments of counsel, it is the opinion of this Court that the following findings of the hearing officer contained in the Findings of Fact and Conclusions of Law (*Exhibit 1 hereto*) are unsupported by evidence which is both substantial and material in light of the entire record: Nos. 3, 10, 34, 45, 50 and 51. These findings of the Hearing Officer are accordingly **REVERSED.** A copy of the Court's Memorandum Opinion is attached hereto as *Exhibit 3* and is incorporated herein by reference.

While the Court concludes that reasonable minds could differ as to the Hearing Officer's decision regarding Respondent Robert B. Crisp, the Court does not find that such was arbitrary or capricious or unsupported by substantial and material evidence and accordingly affirms his retroactive promotional date of April 22, 2001 to the position of Fire Officer.

The Court does find, however, that the Hearing Officer's decision regarding Respondents Neal R. Maney, Steven Fowler, and Cecil Risden was arbitrary or capricious and unsupported by substantial and material evidence. The Court hereby sets aside the decision of the Hearing Officer to promote Respondents Neal R. Maney, Steven Fowler, and Cecil Risden to the position of Fire Officer effective April 22, 2001, and instead orders that the effective promotional date for Respondents Neal R. Maney and Steven Fowler be September 9, 2001, the date on which they were promoted under a separate process that is not the subject of this action and that the effective promotional date for

Appendix E

Respondent Cecil Risden be March 24, 2002, the date on which he was expected to have been promoted under a separate process that is not the subject of this action.

The Clerk and Master is hereby directed to send certified copies of this Order to counsel of record at the addresses listed below. Costs are to be taxed to the Petitioner.

ENTER this 7 day April, 2003.

s/ Sharon Bell
SHARON BELL
CHANCELLOR

APPROVED FOR ENTRY:
s/ Debra C. Poplin
Debra C. Poplin
Deputy Law Director
Attorney for Petitioner
P.O. Box 1631
Knoxville, TN 37901
PID. NO #211077
(865) 215-2050

s/ Wanda G. Sobieski
Wanda Sobieski
Attorney for Respondents
Sobieski, Messer & Associates
900 S. Gay Street, Suite 1801
Knoxville, Tennessee 37902
(865) 546-7770

APPENDIX F — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE CIVIL SERVICE MERIT BOARD, CITY OF KNOXVILLE ENTERED JANUARY 14, 2002

CIVIL SERVICE MERIT BOARD
CITY OF KNOXVILLE

ROBERT B. CRISP, CECIL RISDEN, NEAL R. MANEY, and STEVEN M. FOWLER.

Grievants,

vs.

THE CITY OF KNOXVILLE,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was came on for hearing on the 12th and 13th day of November, 2001, 27th and 28th day of December, 2001. This Hearing Officer will not repeat the allegations of the Grievants' forms herein but same is filed as collective exhibit one in this cause.

This hearing officer makes the following Findings of Fact:

1. That the Civil Service, for the City of Knoxville, at the direction of the fire department posted on April 15, 1999, a notice for the position of Fire Officer testing.

2. That the posting related that the examination process for Fire Officer will consist of a written exam – 100% of final score.

3. That for reasons unknown, Chief Hamlin decided to have oral interviews in approximately June of 1999 and same were performed in July of 1999.

4. That the first interview panel consisted of seven (7) individuals selected by Chief Hamlin and this Panel was advised by Pat Armstrong from the City of Knoxville, Department of Finance that there were twenty-two (22) positions funded and the committee understood that they were making nominations for twenty-two (22) positions of Fire Officers.

5. That the first interview Panel's findings and conclusions listed twenty-two candidates and that they recommended for promotion.

6. Included in the twenty-two recommended for promotion were Crisp, Fowler and Risden. Mr. Maney apparently did very poorly in the interview process and the Panel was also told Mr. Maney was not eligible for promotion.

7. The City wave no logical nor reasonable explanation as to why the promotions were not made following the first interview nor quite frankly, following the written test.

Appendix F

8. That promotions within the fire department are made in the sole discretion of its chief and that the chief does not have to follow any recommendations nor is he guided by test scores nor interview panel recommendations.

9. That at the time of the posting, there were at least twenty or twenty-two vacancies in the position of Fire Officer within the City of Knoxville Fire Department.

10. That the failure to fill these vacancies was costing the city somewhere between seventy and eighty thousand dollars per month in overtime pay.

11. The lawsuit, *Sharp vs. City of Knoxville,* an action by firefighters against the City of Knoxville, was decided on the 14th day of February, 2000.

12. That other promotions within the fire department occurred after April of 1999, and prior to the promotion of twelve firefighters in March of 2001.

13. That Chief Hamlin named a second interview panel which interview the applicants for these positions in July of 2000, that following the results of the second interview panel, it appeared that Robert Crisp was twenty-third on the list of applicants based on the two oral interviews and the written examination.

14. That on July 26, 2000, Chief Hamlin made a request to Karen Day, Civil Service Director, to increase the number of positions to be filled from twelve (12) to twenty-two (22).

15. That as a result of a federal injunction issued by Robert P. Murrian, United States Magistrate Judge, on the 26th of July, 2000, "Mayor Victor Ashe is hereby enjoined from taking any adverse employment actions such as transfers, demotions, refusal to hire, refusal to promote, reduction of compensation or refusal to increase compensation of the Knoxville Fire Department Firefighters on a count of their political beliefs and associations or their choice to remain neutral in political matters."

16. That as a result of this injunction, Victor Ashe, Mayor designated Randy Vineyard, Finance Director for the City of Knoxville to be the supervisor in charge of the fire department pursuant to a memorandum issued by Victor Ashe dated August 4, 2001.

17. That Chief Hamlin could not or did not make the promotions because of instructions or directions from Michael Kelly, Law Director.

18. That Randy Vineyard, without consultation with Chief Hamlin did, on the 30th of August, 2000, rescinded the request for twenty-two (22) positions to be filled and reduced the number to twelve (12).

19. That Randy Vineyard's explanation as to the reason was that there were other firefighters, in the meantime, that is since the original posting and testing, who had become eligible to apply for the position of a firefighter and therefore he thought it fair that they be given that opportunity to apply for promotion to the position of Fire Officer.

20. That Randy Vineyard did not visit fire halls, did not meet with firemen, and from all appearances based on the proof, was not involved in any decision making processed involving the lire department other than his rescission of the number to be promoted.

21. That a Civil Service Action was filed in February 2001, styled *Grande vs. The City of Knoxville*, which included most of the firefighters who had taken the test and applied for these positions. This was an effort to force the city of Knoxville, to fill the Fire Officer Positions.

22. That all of the members of the first interview panel with the exception of Chief Pressley, signed a written memorandum and/or letter to Chief Hamlin urging the filling of all vacant positions within the fire department and this was done on March 19, 2001.

23. That the second interview panel also wrote a letter on March 19, 2001, urging chief Hamlin to make the promotions and fill the positions.

24. That this Hearing Officer finds that Chief Hamlin, in fact, wanted to fill the positions.

25. That Robert Crisp had been active in earlier mayoral campaigns on behalf of Victor Ashe prior to 1995.

26. That Robert Crisp and/or his wife supported candidates other that Victor Ashe in the 1995 and 1999 campaigns.

Appendix F

27. That Robert Crisp signed a sheet on July 24, 1995, at a fire hall meeting indicating his support for Ivan Harmon for mayor.

28. That Robert Crisp had a medical condition known as Alpha 1, a respiratory condition that impacted his ability as an active firefighter.

29. That once this condition became known. Robert Crisp was transferred to the firefighter training center and performed his duties in a highly satisfactorily manner.

30. That on June 25, 1997, Dr. William Cloud, the city's medical officer, forwarded a memorandum to the fire chief and deputy fire chief reference Mr. Crisp's medical condition.

31. That Robert Crisp was never given a copy of this letter.

32. That Dr. Estes, a pulmonary specialist seen by Robert Crisp prepared a letter and forwarded it to the city of Knoxville indicating Crisp could perform a desk job free of smoke, but this letter was never entered in Robert Crisp's medical file and Dr. Cloud never saw it.

33. That Dr. Cloud, on March 28, 2001, wrote a letter to Chief Hamlin, Beverly Clemmer and Ron Mills, the latter two of the City of Knoxville Law Department, reference Robert Crisp even though Dr. Cloud had not seen Robert Crisp since 1996.

Appendix F

34. That Chief Hamlin and City Law Director, Michael Kelly went to see civil Service Director, Karen Day for the sole and exclusive purpose of attempting to disqualify Robert Crisp from eligibility to be promoted to Fire Officer.

35. That at the request of the fire chief, the Civil Service office posted for twenty (20) additional firefighters on or about the 16th of March, 2001, even though they had made no promotions reference the posting of April 15, 1999.

36. That on the 26th of March, 2001, twelve (12) firefighters who had tested for promotion were promoted to Fire Officer, none of which included the grievants.

37. That the Civil Service rules and regulations provide that when promotions are made, those who apply and are not selected for promotion, must be listed with the reasons that they were not promoted.

38. That on the March 26, 2001, list for promotions there was attached a list including Robert Crisp who was not promoted, the following language was included, "Mr. Crisp did not meet the minimum physical qualification test for Fire Officer and therefore, is not eligible for promotion to Fire Officer."

39. On the 23rd of February, 2001, the medical office faxed a follow-up medical examination questionnaire to Robert Crisp.

40. That on February 26, 2001, Robert Crisp received from the city of Knoxville medical services via fax, a copy of the original respiratory medical evaluation questionnaire and the PLHCP Follow-up Medical Examination form that was forwarded on March 23, 2001, which is blank even though that same form that had been faxed to him on February 23, 2001, signed by William W. Cloud, M.D. dated February 6, 2001, had directions stating that he should be examined by a pulmonary specialist.

41. That on March 6, 2001, Assistant Chief Mikael H. Roberts forwarded a memorandum to master firefighter Robert B. Crisp, Jr. stating that Chief Hamlin had instructed him, Roberts, to follow-up on Dr. Cloud's request that Crisp verify that he has an appointment with a pulmonary specialist by March 9.

42. That Robert Crisp had recommended Mr. Gary Sharp, the same Sharp who had a pending suit against the City of Knoxville, for a position on the Mayor's Advisory Committee.

43. That Assistant Chief Pressley had stated in the discussion with the first interview panel that if Robert Crisp were promoted, he would, within one year, place him in the most active fire hall in the city of Knoxville.

44. That Chief Hamlin had made statements to the effect that Robert Crisp was a thorn in the mayor's side and was an embarrassment to the mayor.

45. That Chief Hamlin had further made the statement that Robert Crisp was not promotable and that Mayor Ashe would not sign any promotion papers that had Robert Crisp's name included.

46. That there was no logical nor valid reason stated why these promotions should not have been made shortly after the written examination in 1999 following the first interview panel, nor after the second interview process.

47. That the failure to make the promotions cost the city of Knoxville hundreds of thousands of dollars in overtime pay which was totally unnecessary.

48. That the first oral interview committee was told that Neal Maney was ineligible for promotion because he had had a suspension within the restricted time period.

49. That Neal Maney was, in fact, eligible for promotion as he did not have a suspension from duty that would have prohibited him from being promoted.

50. Long before the issuance of the injunction by Robert P. Murrian, the powers that be within the City of Knoxville and its fire department knew that Mayor Ashe would not, if possible, promote Robert Crisp and this was not forgotten by the powers that be following the injunction and Mayor Ashe's transfer of power to Randy Vineyard.

51. That had Robert Crisp not been a candidate for promotion, at least twenty-two (22) promotions would have been made months before the March 26, 2001 date.

Appendix F

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

A. That Robert B. Crisp, Jr. was denied promotion for political reasons and that his promotion should be retroactive to March 26, 2001, with all back pay, seniority and benefits to which he would have been entitled had he been promoted at that time.

B. That the City's failure to promote or fill the twenty-two (22) positions in March of 2001 was an effort to deny Robert Crisp a promotion and that the failure to promote the twenty-two (22) adversely impacted Neal R. Maney, Steven M. Fowler and Cecil Risden all of whom would have been promoted had the twenty-two (22) positions been filled. Accordingly, this Hearing Officer directs that these three (3) be promoted retroactively to March 26, 2001, with all back pay and other benefits to which they would have been entitled.

ENTER this the 14th day of January 2002.

s/ Bill W. Petty
BILL W. PETTY, Hearing Officer

APPENDIX G — CORRECTED ORDER OF THE CIVIL SERVICE MERIT BOARD, CITY OF KNOXVILLE DATED JANUARY 18, 2002

CIVIL SERVICE MERIT BOARD
CITY OF KNOXVILLE

ROBERT B. CRISP, CECIL RISDEN, NEAL R. MANEY, and STEVEN M. FOWLER,

Grievants,

vs.

THE CITY OF KNOXVILLE,

Respondent.

CORRECTED ORDER

That the Findings of Fact and Conclusions of Law executed and filed on the 14th day of January, 2002, reflects that the promotions-reference the Grievants should be retroactive to March 26, 2001. This is in error in that the promotion to Fire Officer which occurred following the Grande Grievance was effective April 22, 2001.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the promotions reference Robert B. Crisp, Jr., Neal R. Maney, Steven M. Fowler and Cecil Risden shall be effective the 22nd day of April, 2001 and those promoted thereafter shall have their promotions retroactive to that date and Cecil Risden shall be promoted as of that date that is, April 22, 2001.

Appendix G

This 18th day of January, 2002.

s/ Bill W. Petty
BILL W. PETTY, Hearing Officer

(2)

FILED
AUG 11 2003

No. 03-72

IN THE

Supreme Court of the United States

GARY G. SHARPE, *et al.*,

Petitioners,

v.

BRUCE CURETON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

The questions framed by the Petition are merely presented in a fashion to incite and inflame passion rather than to present substantive issues for appeal. The issue as to the continuing pattern of violations is raised to determine whether Petitioners' filing of the Complaint, after the expiration of the statute of limitations, can be used as stated by the Sixth Circuit as an ". . . effort to sidestep the one year Tennessee statute of limitations. . . ." (Pet., App. A at 13a). The Sixth Circuit cited and followed this Court's rulings as to continuing violations when it affirmed the trial court's dismissal of a portion of Petitioners' claims by holding that the claims were barred by the statute of limitations and that the continuing violation doctrine did not apply to the facts of this case.

As to the Petitioners' assertions that the Rule 68 offers made by Defendants on December 6, 1996 were vague and ambiguous, the Sixth Circuit properly found that the Rule 68 offers were not void for vagueness and were made in accordance with the requirements of Rule 68 of the Federal Rules of Civil Procedure. The Sixth Circuit clearly saw Petitioners' flawed argument for what it is – an attempt to escape Rule 68 consequences for having overvalued their case. Petitioners did not accept the clear and unambiguous offers, and they are not entitled to attorney fees from and after the date of the offers.

Neither the Sixth Circuit's actual ruling nor the record below support the argument raised by the Petition that the federal courts are somehow powerless in cases of this nature. The rulings by the Sixth Circuit and the trial court are not in conflict with *Elrod v. Burns*, 427 U.S. 347 (1976), despite

Petitioners' fife and drum appeal to emotion. Petitioners even attempt to sustain such an emotional appeal by filing Appendixes E and F to their Petition which include new allegations neither pled nor admitted into evidence as a part of the trial in this case. (Pet., App. E and F). The argument raised by Petitioners is merely an attempt to incite rather than recite the actual facts and law of this case.

Petitioners' conclusory assertions that the federal courts are powerless and that Rule 68 is applied unreasonably indicate that this Petition has no far reaching implications. Basically, Petitioners make appeals to passion and prejudice to continue a lawsuit, a large part of which has been barred by the statute of limitations from the outset, in order to otherwise recover attorney fees properly disallowed by the Sixth Circuit on account of Petitioners' failure to accept clear and unambiguous Rule 68 offers. The Sixth Circuit's ruling was proper in all respects. The Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I.

NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTIONS PRESENTED BY THE PETITIONER

Petitioners' original Complaint was for five (5) individual firefighters. The case was tried as to the individual cases of each firefighter. No class action suit was filed nor was there a certification of a class, although Petitioners refer to a class action (Pet. at 8) and to class representation (Pet. at 9). Petitioners failed to allege a class action (Fed. R. Civ. P. 23) or to seek class certification (Fed. R. Civ. P. 23(b) and (c)) in any original or amended pleading. They cannot at this late date seek to add a

class action to a lawsuit after the trial of a case. This argument was made after the trial of the present case and presented to the appellate court. The Sixth Circuit dealt with the issue by finding, "Here the plaintiffs do not represent a class, and have otherwise failed to allege class-wide discriminatory action." (Pet., App. A at 18a).

The contents of Appendixes E and F cannot even be found in the original trial record in this case, considering that such matters post date the trial, and should be stricken from the Petition. The Sixth Circuit in FN 15 denied plaintiff's motion to consider newly emerged facts not considered by the Court. (Pet., App. A at 30a). Yet Appendixes E and F are the very items as were previously excluded. The Petition on pages 8, 9, 10, and 13 refer to matters not in the original record. Petitioners' references to Fireman Crisp (Pet. at 5) were not a part of the record in this case and should be disregarded.

Petitioners' claim that federal courts are powerless is never referred to in either the trial or appellate record. This case was tried, appealed and decided. The Petitioners do not like the opinions handed down by the Sixth Circuit, but they have failed to articulate any reasonable argument, supported by applicable law, to justify their claims. (Pet., App. A).

II.

PETITIONERS' CLAIM OF POWERLESS FEDERAL COURTS IS COMPLETELY DEVOID OF MERIT AND SHOULD BE DENIED

The absurdity of this claim renders a response almost unnecessary. A review of the Sixth Circuit Opinion clearly shows Petitioners' claim that the Sixth Circuit acted contrary to precedents of this Court is devoid of any merit whatsoever. To say a federal court is powerless to enforce a law when Petitioners fail to comply with the requirements to timely file their lawsuit or seek class certification is a shameful assault on the federal judiciary in an attempt to blame someone else for one's own failures. The Sixth Circuit affirmed the District Court's decision regarding findings as to the transfer claims. It was the District Court that dismissed Petitioners' claims for failure to comply with the statute of limitations, and the Sixth Circuit upheld the trial court's dismissal. The Sixth Circuit found that a permanent injunction was inappropriate because Petitioners had failed to demonstrate the likelihood of future harm or that any harm would be irreparable. The class action issue was never raised in the original trial or in the record. To contend that the Sixth Circuit and other federal courts are powerless to remedy properly asserted and timely perfected constitutional questions is disingenuous and truly offensive when one considers that such claim is made in this case in the context of Petitioners' own failures to timely file and frame their lawsuit.

Petitioners claims for injunctive relief and class wide relief lack merit. The Sixth Circuit found and the record supports that the Petitioners, ". . . never sought nor received

class certification." (Pet. App. A at 28a). The Court cited and properly relied upon *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) as the basis for holding that the injunction of the trial court was overly broad.

Further, with respect to the issuance of a permanent injunction, the Sixth Circuit correctly found that the District Court's initial decision not to grant a permanent injunction against the Defendant Ashe was the proper course.

Despite their inflammatory rhetoric, Petitioners have failed even to address the Sixth Circuit's determination that the proof did not support the issuance of an injunction against Ashe. In reversing the District Court, the Sixth Circuit noted that a plaintiff in a civil rights case will only be entitled to a permanent injunction "upon showing 1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998). Further, injunctive relief should only issue "where the dilemma is ripe for judicial resolution, and 'a matter is considered premature for judicial review when the alleged injury is speculative or may never occur.'" (Pet., App. A at 27a) (citing *Kallstrom*, 136 F.3d at 1068).

The Sixth Circuit noted that, in this case, the District Court initially denied the Petitioners' request for a permanent injunction based, in part, upon the fact that Defendant Ashe cannot serve as Mayor beyond his current term, Defendant Cureton has retired as Fire Chief, and Defendant Pressley was not found to have violated the Petitioners' civil rights. (Pet., App. A at 27a). Further, the Petitioners were transferred back to their favored stations in August, 1996, during the pendency of their civil service grievances. *Id.* Only after the

Petitioners filed a motion to alter or amend did the District completely reverse course, without any additional evidence, and issue the permanent injunction. In analyzing the District Court's decision, the Sixth Circuit held:

> The district court correctly emphasized in its initial decision denying the injunction the lack of substantial likelihood of future injury given that: the firefighters were transferred back to their favored locations; Ashe was prohibited from seeking another term in office (and now has less than one year remaining in his last term), and Cureton is no longer available to carry out any retaliation orders due to his retirement. The district court's initial decision denying the injunction was correct.

(Pet., App. A at 30a). In addition to being overly broad, the Sixth Circuit found that an injunction was "unnecessary in any event because the firefighters have failed to establish a sufficient likelihood of future harm, and that any future harm would be irreparable." *Id.*

The Petitioners cannot dispute these facts and cannot disagree with the legal standard for the issuance of a permanent injunction as set out in *Kallstrom*. Indeed, there is no mention whatsoever of these facts in the Petition nor is there any discussion of the applicable legal standard. Therefore, instead of focusing upon the merits, the Petitioners accuse the Sixth Circuit of having an "unduly narrow view of the power of the District Court" and of failing to recognize "the fundamental importance of political freedom . . ." This unjustified attack on the court further evidences the absolute dearth of proof either that future harm is likely or that any future harm would be irreparable. (Pet., App. A at 30a).

III.

PETITIONERS' CLAIM THAT RULE 68 DEFEATS THE CONGRESSIONAL INTENT OF USING 42 U.S.C. § 1988 TO ENCOURAGE PRIVATE CITIZENS TO JOIN IN THE EFFORT TO PRESERVE FUNDAMENTAL RIGHTS SHOULD BE DENIED AND FURTHER INDICATES A COMPLETE LACK OF UNDERSTANDING OF FEDERAL RULE OF CIVIL PROCEDURE 68

Petitioners' assertion that using Rule 68 in a civil rights case defeats the fundamental rights of citizens has no merit.

Whereas Petitioners purport to support their request for Certiorari with self-righteous arguments regarding "our hard won freedoms," the reality of Petitioners' request concerns attorney fees. In this case, the Defendants made separate Rule 68 Offers to each of the five Petitioners on December 6, 1996, less than two months after the original lawsuit was filed. At that time, as now, Petitioners were all represented by the same counsel. None of the five Rule 68 Offers were accepted, and the case proceeded through discovery until it was ultimately tried to a jury in January and February, 2000. At the conclusion of a multi-day trial, the jury awarded a total of $30,645 against three of the four Defendants. This amount was later reduced to $16,001 by the District Court as a result of Petitioners failure to meet the applicable one-year statute of limitations for their 1995 transfer claims.

According to the Sixth Circuit's ruling, the Defendants' Rule 68 Offers were more favorable than this final judgment. Consequently, Petitioners' award of attorney fees was vacated and remanded to the District Court for a determination of the fees that had been earned as of the date of the original

Rule 68 Offers. Inasmuch as these offers were made so early in the litigation, it is unavoidable that the ultimate decision has a dramatic effect on the award of attorney fees, just as Rule 68 contemplates.

Federal Rule of Civil Procedure 68 provides that:

> A party defending a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs accrued . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the cost incurred after the making of the offer.

In a § 1983 action, Rule 68 costs include the plaintiffs' own attorney fees. Thus, when the Rule 68 offer is ultimately greater than the award, the plaintiff may not recover attorney fees from the defendant from the date such offer was made. *Marek v. Chesny*, 473 U.S. 1, 11 (1985); *Mallory v. Eyrich*, 922 F.2d 1273, 1278 (6th Cir. 1991). The Sixth Circuit considered the *Marek* opinion of this Court as well as earlier decisions of the Sixth Circuit and in its Opinion cited *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 295 (6th Cir. 1989). The Sixth Circuit held that the "operation of Rule 68 is mandatory and the District Court retains no discretion under Rule 68 to alter the Rule's sometimes severe application." In the present case, the original lawsuit was filed on the 24th day of October, 1996. The Defendants on December 6, 1996 made a timely Rule 68 Offer to each of the firefighters, which were not accepted. Again, on November 4, 1997, the Defendants made a second offer to each firefighter except for W. Potter, and those offers also

were not accepted. It is stated by the Sixth Circuit in the *Sharpe* Opinion, "Only the jury awards in favor of Scarbrough and F. Potter exceeded the sums specified in the offers, and when the district court subsequently eliminated the transfer claim recoveries on statute of limitation grounds, the Rule 68 offers to each individual plaintiff exceeded each individual jury award." (Pet., App. A at 31a).

The Sixth Circuit in reviewing the appeal of the Petitioners cited the Seventh Circuit case of *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1075-76 (7th Cir. 1999), which held that, "[t]he defendant must show the offer was more favorable than the judgment and the mandatory cost-shifting provision was therefore triggered." (Pet., App. A at 32a). The Sixth Circuit in reviewing the offers made found that the Rule 68 offers were not void for vagueness and that the ". . . offers were sufficiently definite to create the power of acceptance in the firefighters, triggering the mandatory application of Rule 68." (Pet., App. A at 35a).

The purpose of Rule 68 is to force plaintiffs to "think very hard" before proceeding with their particular lawsuits and to encourage settlement by exposing the plaintiffs to the possible award of costs should plaintiffs err in their evaluation of their case. The Petitioners in this case erred in the valuation of their case, and the Sixth Circuit determined that they should not profit upon their failure to accept the Rule 68 Offers made. *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 295 (6th Cir. 1989).

The Rule 68 holding by the Sixth Circuit is not a novel concept or change in the law. It merely reiterates this Court's decision in *Marek v. Chesny* and needs no further revision.

IV.

PETITIONERS' ARGUMENT IN FAVOR OF THE APPLICATION OF THE CONTINUING VIOLATIONS DOCTRINE IS WITHOUT MERIT

It should be noted from the outset that the continuing violation doctrine espoused by Petitioners is being advanced merely to enable the claims of the Petitioners being transferred to escape being barred by the statute of limitations so that attorney fees can be recovered. The District Court found these claims to be barred by the statute of limitations, and the Sixth Circuit merely affirmed the District Court's finding that those claims were not timely filed. The law is unquestioned that there is a one year statute of limitations in civil rights cases in Tennessee. *Wilson v. Garcia*, 471 U.S. 261, 267 (1985); *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984); Tenn. Code Ann. § 28-3-104(a)(3); *Berndt v. State of Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986). The Sixth Circuit in the *Sharpe* Opinion stated, "in an effort to sidestep the one year statute of limitations, the plaintiffs argued for application of the 'continuing violation' doctrine in such a way to toll the limitations period, rendering the transfer claims timely." (Pet., App. A at 11). The Sixth Circuit Opinion clearly relies on this Court's decision in the *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2070 (2002), quoting with approval that "when an employee seeks redress for discrete acts of discrimination or retaliation, the continuing violation doctrine may not be invoked to allow recovery for acts that occurred outside the filing." This Court in *Morgan* went on to say:

> Discrete acts such as termination, failure to promote, denial of transfer or refusal to hire are

> easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice."

Id. at 2072. In contrast, a claim of hostile work environment involves a type of claim of unlawful employment practices which cannot be said to occur on any particular day, but occur over a series of days or years.

In reaching its Opinion, the Sixth Circuit not only considers the rulings of this Court in *Morgan* but also cites *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) and *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-95 (1982). The Sixth Circuit in its Opinion went on to specifically discuss discrete acts versus hostile work environment. A review of plaintiffs' argument does not reveal a citation to any act or conduct which would support Petitioners' position. No greater evidence of the weakness in Petitioners' argument exists than the very desperate (and completely inappropriate) references to matters not properly in the record of the proceedings. Four firemen in this case were transferred on September 26 or 27 of 1995. Within five (5) days of the transfer, all four (4) plaintiffs each filed civil service grievances, some alleging a violation of their constitutional rights. Petitioners even hired their attorney within days after the transfer. A lawsuit was filed by the Petitioners more than one year later on the date of October 24, 1996. There should be no question that persons of reasonable minds could not differ in that these individuals had reason to know of the claimed injuries caused by the discrete act of transfer for more than a year before they filed the lawsuit. The trial judge ruled and dismissed the transfer claims based on the statute of limitations. That finding was upheld by the Sixth Circuit. Petitioners' claim regarding a continuing violation should be dismissed.

V.

THE SIXTH CIRCUIT RULING DOES NOT CONFLICT WITH *ELROD v. BURNS*

Petitioners' transparent attempt to grab this Court's attention by arguing about a powerless federal court system, the improper application of Rule 68, and continuing violations, raises matters that do not conflict with the Constitution, federal statutes, case law, or the federal rules. Plaintiffs' contentions are meritless. The Sixth Circuit recognized clearly that Petitioners were merely trying to sidestep the one year Tennessee statute of limitations by invoking the continuing violation doctrine in an effort to avoid the effects of having grossly overvalued their claims after rejecting Rule 68 Offers made at the outset of the case. The Sixth Circuit examined the continuing violation theory as advanced by the Petitioners regarding this Court's opinion in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061. The Court in reviewing the *Morgan* case followed this Court's decision regarding discrete discriminatory acts and hostile environment claims. The Sixth Circuit held that they could find, "[N]o principled basis upon which to restrict *Morgan* to Title VII claims, and we therefore conclude that the Supreme Court's reasoning must be applied to the firefighter's § 1983 claims." (Pet., App. A at 16a). The Sixth Circuit recently found *Morgan's* construction of the continuing violation doctrine equally applicable to claims of age discrimination and retaliation brought under the Age Discrimination and Employment Act. *Sherman v. Chrysler Corp.* No. 00-2287, 2002 WL 31074591 (6th Cir., Sep. 16, 2002). The Sixth Circuit fully and completely examined the proof and facts involving the firefighters' claims regarding retaliatory transfers. The Sixth Circuit and the trial court agreed that such actions were barred by the statute of limitations in this case.

Obviously, courts are powerless to provide remedies to plaintiffs who do not timely present and perfect their claims. This does not, however, equate to a federal judiciary powerless to otherwise redress true constitutional claims. Petitioners in this case purely and simply did not timely file their transfer lawsuits in order to perfect their constitutional claims.

There is no conflict with *Elrod v. Burns*, 427 U.S. 347 (1976) in this action. The issue as to the transfers was presented to the jury by the trial court. It was after a jury verdict that the Court dismissed the transfer claims brought pursuant to *Elrod v. Burns* because the Petitioners failed to timely file their lawsuit.

VI.

THIS CASE DOES NOT HAVE FAR REACHING IMPLICATIONS OR PRESENT UNSETTLED QUESTIONS OF FEDERAL LAW

Petitioners claims and arguments about Rule 68 and the continuing violation doctrine do not present unique or novel issues nor do they invoke unsettled questions of federal law. To the contrary, the Sixth Circuit relied upon well-settled law as established by this Court's prior decisions. Contrary to having far reaching implications, Petitioners' claims are no more than a vain attempt to recover unwarranted attorney fees resulting from a failure to timely file certain claims and to properly value their case. It is no more complicated or far reaching that that reality.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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(3)

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. Respondents' Brief in Opposition further illuminates the fundamental problem in this case: Respondents refuse to recognize or respect the jury's unappealed finding that Respondents' conduct violated the fundamental rights of Knoxville Firefighters to exercise political freedom.[1]

Respondents rely upon *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998) to argue that Petitioners failed to demonstrate "1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law." Brief in Opposition at p. 5. While complaining vociferously about Petitioners' *Appendices E and F* (Order of the Knox County Chancery Court upholding the Civil Service Merit Board's finding of continued political retaliation against yet another firefighter), Respondents blindly contend that there was no showing of a likelihood of continuing irreparable injury.

As to the first element, clearly there can be no doubt that injury to political freedom is irreparable, as this Court so held in *Elrod v. Burns*, 427 U.S. 347 (1967) and its progeny. Petitioners not only showed a continuing likelihood of irreparable injury, but actually demonstrated continuing political retaliation in the orders attached to the Motion to Consider Post-judgment Facts. Retaliation continued not only during the trial of this cause, but long after. *See Appendices E and F*. As to the second element, there can surely be no question that the loss of political freedom cannot be remedied adequately in money damages.

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1. Respondents attempts to discredit by adjectives rather than analysis demonstrates their fundamental unwillingness to appreciate the significance of the issues involved herein.

Respondents' suggestion that the injunction should be denied because the Mayor is term-limited fails to recognize the reality of the effect of decades of unfettered political retaliation. This Mayor can run again after sitting out only one term. When political retaliation has become "business as usual," it is easily passed from one figurehead to the next. Any showing by this Mayor of alignment with a candidate will be read by those who have learned to survive by sublimating their beliefs as a clear command for future loyalty. The shadow reaches far beyond the current term, particularly if the average employee believes the courts to be unwilling or unable to effectively redress ongoing political retribution. If this Mayor goes unrebuked, all those who work closely with him and remain after he leaves office will likely believe his methods of doing business to be acceptable, just as those assuming his office hereafter will likely also believe themselves free to continue "politics as usual."

II. If Rule 68 is to be read as liberally as the Sixth Circuit has done, then combined with this Court's decision in *Marek v. Chesny*, 473 U.S. 1 (1985) that Rule of Civil Procedure will effectively swallow the public policy and congressional intent expressed in 42 U.S.C. § 1988.

Petitioners respectfully submit that *Marek* was never intended to be read so broadly, nor was Rule 68 intended to apply to a clearly meritorious case that by its nature is not amenable to monetary valuation. To suggest that the most fundamental of constitutional rights can be measured in dollars and cents is to miscomprehend the importance of those rights. Allowing ambiguous and non-specific Rule 68 offers to undercut access to the courts for victims of political retaliation devalues the fundamental rights and the principles critical to governance in a free society.

III. This case squarely presents the question reserved in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002).

In cases of systemic impact, where special courage is needed for individuals to fight an apparently accepted manner of doing business, special consideration should be given. In this case, the only reason Petitioners were returned to their original stations was as a part of a failed settlement. The retaliation, however, continued for years after the transfers and long after the lawsuit was filed. The jury found an overarching scheme of retaliation and political oppression. The simple question for this Court is whether the continuing violations doctrine applies in the most egregious circumstances: systemic cases where an overarching scheme is shown. This issue is particularly poignant where, as here, the shortest statute of limitations (one year) otherwise applies.

CONCLUSION

WHEREFORE, Petitioners respectfully request that this Court grant *Certiorari* to address these important matters.

Respectfully submitted,

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